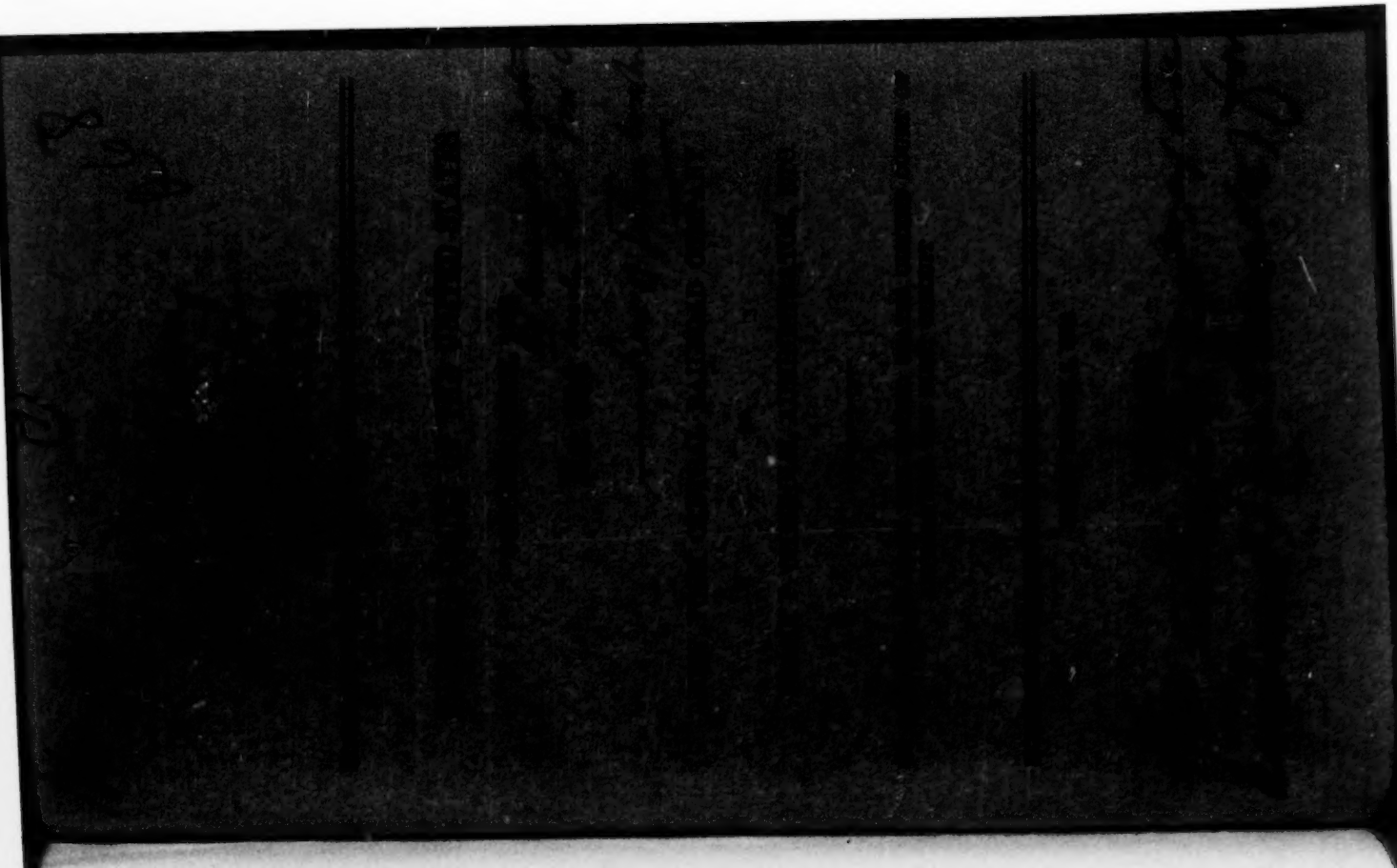

(30,165)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 306

NEW YORK CENTRAL RAILROAD COMPANY

vs.

FRANK P. CHISHOLM, ADMINISTRATOR, ETC.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 8, 1924

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1923.

No. 1637.

NEW YORK CENTRAL RAILROAD COMPANY,
DEFENDANT, PLAINTIFF IN ERROR,

v.

FRANK P. CHISHOLM, ADMINISTRATOR,
PLAINTIFF, DEFENDANT IN ERROR.

ERROR FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BEFORE BINGHAM, JOHNSON AND ANDERSON, JJ.

QUESTION OF LAW CERTIFIED BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT TO THE SUPREME COURT OF THE UNITED STATES.

FEBRUARY 26, 1924.

The facts in this case are as follows:

The plaintiff's intestate, McTier, was assistant chef on a buffet-car constituting part of a train running between Malone, New York, and Montreal, Canada, operated by the defendant, the New York Central Railroad Company. On November 9, 1920, at Valleyfield, about 30 miles over the line into Canada, another car was attached. While this coupling was being made, McTier received an injury due to the alleged negligence of the defendant, from which he died on December 23, 1920. McTier was, and his administrator and the defendant company are, all citizens

of the United States. The suit was brought under the Federal Employers' Liability Act in the United States District Court for the District of Massachusetts, and a verdict of $3,000 was returned.

We desire the instruction of the Supreme Court upon the following question:

Has the administrator of an employee of a common carrier, who receives an injury in a foreign country resulting in his death, — the employee and the common carrier being at the time engaged in foreign commerce and both citizens of the United States,— a right of action under the Federal Employers' Liability Act, or must he rely on the law or statute of the foreign country where the alleged act of negligence occurred or the cause of action arose?

By the Court.

ARTHUR I. CHARRON, *Clerk.*

IN UNITED STATES CIRCUIT COURT OF APPEALS

CLERK'S CERTIFICATE

And now, here, the Judges of the United States Circuit Court of Appeals for the First Circuit, certify that the foregoing is a true copy of an Order of Court entered on February 26, 1924, in said cause numbered and entitled No. 1637, New York Central Railroad Company, Defendant, Plaintiff in Error, v. Frank P. Chisholm, Administrator, Plaintiff, Defendant in Error, and that pursuant to said order, the statement of facts and question law arising thereon, together with the fact that said Circuit Court of Appeals desires the instruction of the Supreme Court of the United States for the proper decision of said question of law, contained in said order, are hereby certified under the seal of said United States Circuit Court of Appeals for transmission to said Supreme Court.

In testimony whereof I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit at Boston, in the First Judicial Circuit, this twenty-eighth day of February, A. D. 1924.

Arthur I. Charron, Clerk. (Seal of the United States Circuit Court of Appeals, First Circuit.)

Endorsed on cover: File No. 30,165. U. S. Circuit Court of Appeals, First Circuit. Term No. 306. New York Central Railroad Company vs. Frank P. Chisholm, administrator, etc. (Certificate.) Filed March 5th, 1924. File No. 30,165.

Supreme Court of the United States.

OCTOBER TERM, 1924.

No. 306.

NEW YORK CENTRAL RAILROAD COMPANY,
Defendant, Plaintiff in Error,
v.
FRANK P. CHISHOLM, ADMINISTRATOR,
Plaintiff, Defendant in Error.

BRIEF FOR PLAINTIFF, DEFENDANT IN ERROR.

This is a certificate from the Circuit Court of Appeals for the First Circuit, under section 239 of the Judicial Code. The essential facts and the questions propounded are fully set forth in the certificate.

The defendant in error contends that the first part of the query should be answered in the affirmative—that he has a right of action under the Federal Employers' Liability Act; and the second in the negative—that he is not bound to rely upon the law or statute of the foreign country where the act of negligence occurred, for the following reasons:

I.

The Federal Employers' Liability Act of April 22, 1908, c. 149, Comp. Sts. Ann. 8657, sec. 1, as amended, provides in substance:

> "Every common carrier by railroad while engaging in commerce between any of the several states or territories . . . or between any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband, et cetera. . . ."

Section 6 of said act provides:

> "Under this act an action may be brought in a Circuit Court of the United States; in the district of the residence of the defendant, or in which the cause of action arose, *or in which the defendant shall be doing business, at the time of commencing such action.*"

It is admitted that the plaintiff's, defendant in error's, intestate was an employee engaged in interstate commerce at the time he received the injuries resulting in his death, and that the plaintiff in error was a common carrier by railroad actually engaged in commerce between the United States and a foreign nation at the time the employee received his injury. The statute in question, therefore, includes him, and clearly gives him a right of action. Under section 6 suit need not be brought in the district "*in which the cause of action arose.*"

The action of the employee's administrator was, therefore, brought in the district in which the defendant was doing business, and in which the employee

resided at the time of his death. The District Court of the United States for the District of Massachusetts, therefore, had jurisdiction to render the judgment in his favor, and has present power to enforce it. It should be noted that the plaintiff and defendant are both citizens of the United States. Both are in a Court of the United States, claiming rights under a law of the United States. The contract of employment, and the equipment of the train upon which the plaintiff's intestate was injured, took place in the United States. The plaintiff and defendant were engaged in a round trip between the United States and a foreign country at the time of the injury resulting in the death of the plaintiff's intestate.

II.

The power of Congress to enact this legislation is not to be questioned; and its purpose is not open to doubt.

Howard v. *Ill. Central R.R. Co.*, 207 U.S. 461.

Mondou v. *N.Y., N.H. & H. R.R. Co.*, 223 U.S. 345.

Wilson v. *New*, 243 U.S. 351.

In the *Mondou* case the Court said:

> "The act of interstate commerce is done by the labor of men and with the help of things; and these men and things are the agents and instruments of commerce. If the agents or instruments are destroyed while they are doing the act, commerce is stopped."

This Court has held, as was stated by Chief Justice

White in *Wilson* v. *New*, 243 U.S. 351, that Congress has "the right, because of the public interest, to regulate the relation of employer and employee and of the employees among themselves, and to give to the latter peculiar and special rights safeguarding their persons, protecting them in case of accident, *and giving efficient remedies for that purpose.*"

The Federal Employers' Liability Act is one of a series of acts to make carriage by rail in interstate and foreign commerce more safe and efficient for those employed or engaged in it, such as automatic couplers, grab-irons, air-brakes, the safety appliances, boiler inspection, the ash-pan, and the hours of service acts.

This act belongs to a class of beneficent legislation enacted, within comparatively recent years, to relieve the servant from some of the disabilities of the common law, to make life and limb safer, and to make recovery, or compensation therefor, when lost or impaired, more certain.

The reason for and history of this legislation is stated very fully in the dissenting opinion of Mr. Justice Brandeis in case of *New York Central Railroad Co.* v. *Winfield*, 244 U.S. 147. He shows that in 1905 and 1906 the number of railroad employees killed while on duty was 3807, and the number injured 55,524.

III.

The act, therefore, should be construed liberally, and be held to include all who come fairly within its scope and benefits.

The very title of the act is significant, and attests its purpose: "AN ACT RELATING TO THE LIABILITY OF

COMMON CARRIERS BY RAILROAD TO THEIR EMPLOYEES IN CERTAIN CASES."

The Court has construed the act broadly and logically to include every employee who could be reasonably said to be engaged in any part of interstate commerce at the time of his injury.

Philadelphia & Reading R.R. Co. v. *Di Donata*, 256 U.S. 326 (flagman killed by an unknown train at a railroad crossing).

Penderson v. *Del., L. & W. R.R. Co.*, 229 U.S. 146 (bridge repairer).

St. Louis, S.F. & T. R. Co. v. *Seale*, 229 U.S. 156 (yard clerk going to meet an interstate train).

Erie R.R. Co. v. *Collins*, 253 U.S. 77 (an employee operating signal tower and pumping station).

Phila., B. & W. R. Co. v. *Smith*, 250 U.S. 101.

The Supreme Court of Pennsylvania, in *Coons* v. *Phila. & R. Ry. Co.*, 114 Atl. 262, stated this to be the law:

> "Employment follows interstate transportation and begins when the workman on a carrier's premises makes a forward move to serve in that traffic or employment, and ends only after he has completely disassociated himself therefrom."

IV.

The Federal Employers' Liability Act, while it may not be identical in principle with the Workmen's Compensation Acts under state laws, yet it has been held

to be exclusive as to employees of railroads actually engaged in interstate commerce, and to supersede state Workmen's Compensation Law as far as it is applicable to such employee.

N.Y. Central R.R. Co. v. *Winfield*, 244 U.S. 147.
Mo., K. & T. R. Co. v. *Wolf*, 226 U.S. 570.
Mich. C. R. Co. v. *Freeland*, 227 U.S. 59.
No. Carolina R.R. Co. v. *Zachary*, 232 U.S. 248.
N.Y. Central R.R. Co. v. *Porter*, 249 U.S. 168.

The Federal Employers' Liability Act includes one feature, at least, of the Workmen's Compensation Act, in that it provides in section 5 that, in any action brought against a common carrier under the act, any sum that it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee, or person entitled thereto on account of the injury or death, shall be set off against the amount recovered.

V.

The Workmen's Compensation Acts of Connecticut, New York, West Virginia, Ohio, New Jersey, Minnesota, Colorado, and California have been held to be extraterritorial; that is to say, that compensation may be awarded in their Courts for injuries occurring outside the state.

State, ex rel. Chambers, v. *District Court*, 139 Minn. 205.

State, ex rel. Maryland Casualty Co., v. *The District Court*, 140 Minn. 427.

Kennerson v. *Thames Tow Boat Co.*, 89 Conn. 367.

Industrial Commission v. *Aetna L. Insurance Co.*, 174 Pac. 589 (Colorado case).

Pierce v. *Bekins Van & Storage Co.*, 172 N.W. 191.

Post v. *Burgher & Gohlke*, 216 N.Y. 544.

Fitzpatrick v. *Blackall & B. Co.*, 220 N.Y. 671.

Gilbert v. *Deslauries &c.*, 167 N.Y. Supp. 274.

The Minnesota case was one where the plaintiff's intestate was employed by a Minnesota corporation doing business in North Dakota and elsewhere, and while engaged in his employer's business in North Dakota he was killed. The Minnesota Court held that the employee's personal representative was entitled to compensation. Construing the statute, the Court said:

> "The statute evidences no affirmative purpose to restrict the operation of the contract to accidental injuries happening within the state. That a statute might make such limitations expressly is clear; or the wording of it might require such construction by way of proper inference."

This rule of interpretation, if applied to the Federal Employers' Liability Act, would bring the plaintiff clearly within its provisions.

In the Colorado case the Court said:

> "To hold that the Colorado statute did not

apply to injuries occurring outside of the state would destroy the very spirit and purpose of the law as it affects the employee and the public welfare."

In the New York case the Court said:

"One of the objects of the act was to prevent injured workmen and their dependents from becoming objects of charity, and the danger of injured workmen and their dependents becoming objects of charity was just as great when the accident occurred outside of the boundaries of the state as when it occurred within."

VI.

"Acts construed to be contractual protect one injured outside the state when the contract of employment was made within the state and is governed by the laws of the state."

Honnold, Workmen's Compensation Act, vol. 1, sec. 8, citing—
Roundsville v. *Central R.R. Co.*, 87 N.J. Law, 371:

There the Court said:

"The contract of employment is a New Jersey contract; the fact that the accident happened in another state is irrelevant."

In *Gooding* v. *Ott*, W. Va.; 87 S.E. 863, the Workmen's Compensation Act provided for payment to all employees who "shall have received injuries in the state in the course of and resulting from their employ-

ment." *Held* to include injuries received outside of the state.

The Federal Employers' Liability Act comprehends every common carrier by rail, and any employee.

The act may apply to an accident happening in a foreign country.

The Bulletin, N.Y., No. 5, p. 5.

In re Schmidt, Ohio Industrial Co., Willoughby No. 7, p. 21. (That was a case where the employee was sent up to a foreign state.)

See also *Potkin* v. *B. Baking Co.*, 3 Cal. 1 A.C., Dec. 12.

VII.

The Act of September 7, 1916, c. 458, Comp. Sts. 8932, known as the Federal Employees' Compensation Act, provides in substance that the United States shall pay compensation as hereinafter specified for the disability or death of an employee resulting from a personal injury sustained while in the performance of his duty, wilful misconduct excepted.

It cannot be doubted that an employee of the United States sent upon a mission by the United States to any foreign country, if injured through no wilful misconduct on his part, would be entitled to compensation for his injuries, and if his injuries resulted in his death, his dependents would be entitled to compensation.

Act of May 30, 1908, Federal Workmen's Compensation Act, now contained in Act of September 7, 1916, has been held to be extraterritorial.

James Nellis case, Opinions of Solicitor General, United States Department of Labor, Workmen's Compensation Act, compiled April, 1915, p. 286; claimant was employed as a fireman by the Isthmian Canal Commission. He was injured while assisting in putting out a fire in Colon outside of the territory of the United States. The Solicitor General said:

> "Is it the fact that the site of the employment happens to be across the marginal line which divides it from the territory over which the United States has no control affect the matter? I think not. *The act says nothing about foreign or domestic territory.* The claimant was in the employ of the United States, and it was in pursuance of the orders of his superior officer that he crossed the marginal line."

VIII.

The question is not whether the laws of a sovereign state extend beyond its borders, but whether the Federal Employers' Liability Act includes within its scope and benefits an employee injured or killed upon a train plying between the United States and Canada, the accident happening just across the border.

The cases relied upon by the plaintiff in error would seem to have little or no application to the one at bar—*Slater* v. *Mexican R.R. Co.*, 194 U.S. 120; *American Banana Co.* v. *United States*, 213 U.S. 347, and others—since none of these cases deal with the Federal Employers' Liability Act, and the rights and obligations created thereunder.

The Employers' Liability Act is *sui generis;* it was

enacted in the interest of social justice. To say that it stops at the border defeats its own end. To say that the power of Congress over interstate commerce stops at the border is a denial of its undoubted power to regulate commerce with foreign nations. The act is a condition imposed upon the carrier by railroad to his engaging in interstate commerce. It cannot be said that the act cannot be enforced in the Courts of the United States having jurisdiction of both parties.

Upon the question of the power of Congress to enact a law having extraterritorial effect, this Court has decided that affirmatively. In *United States* v. *Bowman,* 260 U.S. 94, it was held that a crime committed or consummated in Brazil may be punished in the Courts of the United States; and the Court pointed out a number of instances in which the criminal laws of the United States must be given an extraterritorial effect, or they would not be effective at all. The Chief Justice, speaking, said:

> "We have in this case a question of statutory construction. The necessary locus, when not specially defined, depends upon the purpose of Congress, as evidenced by the description and nature of the crime, and upon the territorial limitations upon the power and jurisdiction of a government to punish crime under the law of nations."

Further, the Court said:

> "The three defendants who were found in New York were citizens of the United States, and were certainly subject to such laws as it might pass to

> protect itself and its property. Clearly it is no offense to the dignity or right of sovereignty of Brazil to hold them for this crime against the Government to which they owe allegiance."

There would seem to be a strong analogy here. The Employers' Liability Act was enacted for the protection and welfare of the nation quite as much as any criminal law, and if extraterritorial effect is to be given to a criminal law, why not to the Federal Employers' Liability Act?

A tort for personal injuries, assuming that recovery under the Federal Employers' Liability Act is based upon negligence, has no necessary connection with the locus where it occurs, and an action therefor has always been regarded as a transitory one.

This Court, in *Panama Railroad Co.* v. *Napier Shipping Co.*, 166 U.S. 280, upheld the right of an action of tort for damages done to the British steamer "Stroma" while actually lying at the respondent's pier at the Port of Colon, Panama. The Court said:

> "The fact that the cause of action arose in the waters of a foreign port is immaterial. While in some cases it is said that a court of admiralty has jurisdiction of all torts arising upon the high seas, or upon the navigable waters of the United States, the connection in which those words are found indicate that they were not used restrictively; and the law is entirely well settled, both in England and in this country, that torts originating within the waters of a foreign power may be the subject of a suit in a domestic court."

The Court said further:

> "Had both parties to the libel been foreigners, it might have been within the discretion of the court to decline jurisdiction of the case, though the better opinion is that, even under those circumstances, the court will take cognizance of torts to which both parties are foreigners; at least in the absence of a protest from a foreign consul."

Another illustration of this Court's giving effect to a statute of the United States outside of the territorial limits of the United States is the *Oceanic Steam Navigation Co.* v. *Mellor*, 233 U.S. 730. That was a case where a number of actions were brought against the owners of the steamship "Titanic" for loss sustained by reason of a collision between that ship and an iceberg in mid-ocean. Petition was brought by the owner to limit the liability under R.S. 4283, 4285. Mellor, a British subject, excepted to the petition on the ground that the acts by reason of which and for which the petitioner claims the limitation of liability took place on board a British registered vessel on the high seas, and therefore the law of the United States would not apply. Anderson, a citizen of the United States, excepted on the ground that the law of the United States could not and that of England was not shown to apply. The Court held that the law of the United States would apply rather than the law of the foreign country.

IX.

The right of a sovereign to regulate the conduct of its own citizens or subjects, outside of its own territory in many relations, has been generally recognized.

"The laws of a sovereign may extend beyond its own territory as to its own citizens. The laws of no nation can justly extend beyond its own territories except so far as regards its own citizens."

Justice Story in *The Apollon*, 9 Wheat. 362.

"It is conceded that the legislation of every country is territorial; that beyond its own territory, it can only affect its own subjects or citizens."

Marshall, C.J., in *Rose* v. *Himely*, 4 Cranch, 241.

"While a sovereign can exercise no legislative jurisdiction outside his own boundaries, he, nevertheless, has power over the acts of his own citizens wherever they may be. As regards his own citizens, therefore, he may issue orders to them for the regulation of their conduct while they are abroad."

Professor Beale, Harvard Law Review, vol. 36, No. 3, p. 253.

The following are instances in which the United States asserts extraterritorial jurisdiction, collected by William Notz, in the Yale Law Journal for November, 1919, p. 38, and cited with approval by Willoughby, Fundamental Concepts of Public Law, p. 411:

"Transportations of explosives on vessels or vehicles carrying passengers between the United States and foreign countries (Criminal Code, sec.

232); judicial authority of American diplomatic and other representatives in certain non-Christian, uncivilized countries (U. S. Rev. St. secs. 4083-4088); islands having guano deposits discovered by an American citizen (U. S. Rev. St., sec. 5576); murder on the high seas (Crim. Code, secs. 272, 273, 275); citizens voluntarily on board a foreign slave-trade vessel (Crim. Code, sec. 252); treason (Crim. Code, sec. 1); criminal correspondence with foreign governments (Crim. Code, sec. 5); perjury or forgery committed in connection with an oath, affidavit or deposition administered or taken by an American Secretary of legation or consular official abroad (U. S. Rev. Sts., sec. 1750)."

X.

The language of the Federal Employers' Liability Act is broad enough to cover a case of injury or accident resulting in death outside of the territory of the United States.

It provides:

> "Every common carrier by railroad while engaging in commerce between any of the several states and any foreign nation or nations, shall be liable in damages to any person suffering *injury while he is employed by such carrier in such commerce,* or in case of death to his personal representative."

The liability is one created by statute, and goes with the employment.

The United States Court has jurisdiction to render

the judgment under section 6 of the act. The action need not be brought in the district where the cause of action arose.

> "It is fundamental that the sovereign of a country acting through the courts thereof, has jurisdiction over, i. e., has a right to adjudicate upon any matter in regard to which he can give an effective judgment. . . . An effective judgment means a decree which the sovereign under whose authority it is delivered has in fact the power to enforce against the person bound by it."
>
> Dicey, Conflict of Laws, par. 40.
> *Dennick* v. *N.J. Central R.R. Co.*, 103 U.S. 11.

In this case Mr. Justice Miller said:

> "Whenever by either the common law or the statute law of a state, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters, and can obtain jurisdiction of the parties."
>
> "But jurisdiction, whatever else or more it may mean, is *jurisdictio,* in its popular sense of authority to apply the law to the acts of men."
>
> *Wedding* v. *Meyler,* 192 U.S. 573.

XI.

Upon the latter clause of the question certified, must the employee rely on the law or statute of the foreign

country where the alleged act of negligence occurred, or the cause of action arose?

An examination of the Workmen's Compensation Act of the Province of Quebec, as shown in the Revised Statutes of 1919, indicates very clearly that the plaintiff would have had no cause of action under that act in Canada. Section 7324 requires the workman injured to be a resident of the Province of Quebec, and his representative could not recover for the death unless at the time of the accident the employee was a resident of the Province of Quebec.

The act provides also, in Section 7347, that suit cannot be brought in the Superior Court without being authorized by the judge, and he is not entitled to a jury trial. The rights of the plaintiff to sue at common law are reserved under the act; but at common law there was no right of action for the death of another.

Section 7323 provides in substance: When the accident causes death, compensation shall consist of a sum equal to four times the average yearly wages, which shall not exceed $2500. This has been amended so as to make it not to exceed $3000.

Under the Federal Employers' Liability Act compensation or recovery is based purely upon negligence. There is no limit to the damages or amount which may be recovered, except that the carrier may set off any sum which it has contributed or paid to any insurance, relief benefit, or indemnity which may have been paid to the injured employee or his personal representative.

The plaintiff, therefore, could not sue in a Court of Canada. It is obvious also that a Court of the United States could not administer the law of Quebec, that

law being essentially so different from our own as to jurisdiction, procedure, and recovery.

Slater v. *Mexican Railway Co., supra.*

The defendant is in this position: He cannot be sued in Canada for the death of the plaintiff's intestate, and if his contention is sound, he cannot be sued in the United States.

XII.

It is submitted that, if the plaintiff has no cause of action under the Federal Employers' Liability Act in a Court of the United States, he has no cause of action anywhere.

In the case of "The Scotland," *National Steamship Navigation Co.* v. *Dyer*, 105 U.S. 24, the Court refused to give effect to the British maritime law. The Court said:

> "In administering justice between parties it is essential to know by what law or code or system of laws, their mutual rights are to be determined. When they arise in a particular country or state, they are generally to be determined by the laws of that state."

The question here is, not what law may be invoked, but whether any law may be invoked for the protection of the plaintiff, since he cannot recover in the Canadian Courts under Canadian law, and may not recover in the United States Courts under Canadian law, for the death resulting from injuries sustained by the plaintiff's intestate.

If the act is construed to be broad enough to cover

an employee of a Canadian railroad injured in this country (*Campbell* v. *Canadian N. Ry. Co.*, 124 Minn. 245), surely it must be broad enough to include a citizen of the United States.

The law says: "*Every common carrier shall be liable in damages to any person suffering injury while he is employed,*" etc. "Every" and "any" have no limitations as to place.

This Court laid down a rule of construction particularly applicable here, in *Wedding* v. *Meyler*, 192 U.S. 572. Justice Holmes speaking (p. 583):

> "It hardly is necessary to be curious or technical when dealing with law-making power, in inquiring precisely what legal conceptions shall be invoked in order to bring to pass what the legislature enacts. If the law-making power says that a matter within its competence shall be so, so it will be, so far as legal theory is concerned, without regard to the *elegantia juris*, or whether it fits that theory or not."

XIII.

There are two great nations upon our northern and southern borders with which we are engaged in interstate commerce daily. There are more than two million men employed by railroads. In 1923 there were 2133 employees killed and 152,873 injured. They and their heirs and dependents are affected by this act.

One of the objects of the founders of the Constitution was "to promote the general welfare" of the people of the United States. It was almost three quarters of a century after the adoption of the Consti-

tution before the first monumental effort "to promote the general welfare" came to pass—the abolition of human slavery. Free labor was not entirely free, and the terrible toll of lives and injuries taken by our industries, mines, factories, and transportation systems compared favorably with the output of many wars. It was some fifty years after before the state and the nation began to enact laws for the "general welfare" that bore directly upon the lives and happiness of the people. The factory-inspection acts, the requirement of safety devices, the regulation of hours of labor and the toil of children, the Workmen's Compensation Act, are milestones in human progress. The Federal Government, within the sphere of its jurisdiction, has nobly aided the states in the long line of legislation affecting those employed in interstate commerce, and those employed by the Government itself. Can there be a neutral zone, or a twilight zone, in which a carrier by railroad may not be compelled to to its duty towards its employees?

It is submitted, therefore, that the answer to the question upon which the Court of Appeals desires the instruction of this Court should be in the affirmative as to the first part thereof—that the employee has a right of action under the Federal Employers' Liability Act; and that he need not rely upon the law or statute of a foreign country where the act of negligence occurred.

Respectfully submitted,

WILLIAM H. LEWIS,
WILLIAM F. KANE,
CHARLES H. HOUSTON.

Supreme Court of the United States

OCTOBER TERM, 1924

No. 368.

NEW YORK CENTRAL RAILROAD COMPANY,
DEFENDANT, *Plaintiff in Error*,

v.

FRANK P. CHISHOLM, ADMINISTRATOR,
PLAINTIFF, *Defendant in Error*.

BRIEF FOR DEFENDANT, PLAINTIFF IN ERROR

LOWELL A. MAYBERRY,
Attorney for plaintiff in error.

SUBJECT INDEX

LIST OF CASES CITED.

Supreme Court of the United States.

OCTOBER TERM, 1924.

No. 306.

NEW YORK CENTRAL RAILROAD COMPANY,
DEFENDANT, *Plaintiff in Error*,

v.

FRANK P. CHISHOLM, ADMINISTRATOR,
PLAINTIFF, *Defendant in Error*.

BRIEF FOR DEFENDANT, PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This case comes before the United States Supreme Court upon a question of law certified by the United States Circuit Court of Appeals for the First Circuit under date of February 26, 1924. The action was originally in the District Court of the United States for the District of Massachusetts and came before the United States Circuit Court of Appeals for the First Circuit upon a writ of error sued out by the New York Central Railroad Company.

The action is one of tort brought by the Administrator of the Estate of Matthew McTier, to recover for the death and conscious suffering of his intestate, who was an assistant chef on a buffet car constituting part of a train running

between Malone in the State of New York and Montreal in the Dominion of Canada operated by the defendant, the New York Central Railroad Company. The alleged wrongful act on the part of the railroad company occurred at Valleyfield, in the Province of Quebec, in the Dominion of Canada, on the 7th day of November, 1920. The accident, which subsequently resulted in McTier's death, was caused while coupling on another car at Valleyfield, the coupling being made with such force that a coffee pot placed upon a shelf in the kitchen of the buffet car in which McTier was working was caused to fall and struck him on the head. He died on December 23, 1920.

The original declaration consisted of two counts under the Federal Employers' Liability Act,—one based upon the death and the other upon the conscious suffering. With the consent of counsel for the plaintiff, the court directed a verdict in favor of the defendant upon the count for conscious suffering. Upon the count for death the jury, to whom it is contended by the defendant the case was erroneously submitted, returned a verdict of $3,000 for the plaintiff.

There is no question raised but McTier and his administrator and the defendant company are all citizens of the United States; that the alleged negligent act of the defendant was committed in the Dominion of Canada, and that the plaintiff's cause of action was founded solely upon the Federal Employers' Liability Act.

QUESTION OF LAW CERTIFIED.

The question of law upon which the United States Circuit Court of Appeals for the First Circuit desire the instruction of the Supreme Court of the United States is:

Has the administrator of an employee of a common carrier, who receives an injury in a foreign country resulting in his death,—the employee and the common carrier being at the time engaged in foreign commerce and both

citizens of the United States,—a right of action under the Federal Employers' Liability Act, or must he rely on the law or statute of the foreign country where the alleged act of negligence occurred or the cause of action arose?

FEDERAL EMPLOYERS' LIABILITY ACT.

For convenience, the Federal Employers' Liability Act as it stood upon the day upon which this accident occurred, as well as the day upon which the plaintiff's intestate died, is set forth in full.

"U. S. Compiled Statutes, ss. 8657–8665.

AN ACT Relating to the liability of common carriers by railroad to their employes in certain cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. SECTION 1. Every common carrier by railroad while engaging *in commerce between* any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia *or any of the States or Territories and any foreign nation or nations*, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employe, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe; and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment.

SEC. 2. Every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions, of the United States shall be liable in damages to any person suffering

injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employe, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe; and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment.

SEC. 3. In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employe or where such injuries have resulted in his death, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe: *Provided*, That no such employe who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe.

SEC. 4. In any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employes, such employe shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe.

SEC. 5. Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may

set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employe or the person entitled thereto on account of the injury or death for which said action was brought.

SEC. 6. No action shall be maintained under this act unless commenced within two years from the day the cause of action accrued.

Under this act an action may be brought in a circuit court of the United States; in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several States, and no case arising under this act and brought in any State court of competent jurisdiction shall be removed to any court of the United States.

SEC. 7. The term 'common carrier' as used in this act shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

SEC. 8. Nothing in this act shall be held to limit the duty or liability of common carriers or to impair the rights of their employes under any other act or acts of Congress, or to affect the prosecution of any pending proceeding or right of action under the act of Congress entitled 'An Act relating to liability of common carriers in the District of Columbia and Territories, and to common carriers engaged in commerce between the States and between the States and foreign nations to their employes', approved June 11, 1906.

SEC. 9. Any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe, and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe, but in such cases there shall be only one recovery for the same injury."

I.

BRIEF AND ARGUMENT.

In effect the question of law presented is whether the Federal Employers' Liability Act has extraterritorial effect and follows citizens of the United States into foreign countries and settles their rights while in such countries. So far as I have been able to find, the precise question before the Court has never been directly passed upon by any court in this country. I have found numerous decisions which I will refer to in my argument which appear to me to be analogous in their principles, and the reasoning of which would seem to foreclose any such conclusion as the ruling of the District Court compels and as is contended for by the plaintiff. I submit that the common law or the Civil Code of the Province of Quebec gives to the plaintiff his only remedy, and if he elects not to pursue that remedy he does so to his own loss.

It is my contention that in the instant case the plaintiff has no right of action under the Federal Employers' Liability Act, for the following reasons:

(1) The *lex loci* and not the *lex fori* governs in cases of this character.

Sections 1, 3 and 4 of the Act plainly show that it was the intention of Congress to make negligence the basis of the right to damages of employees of interstate or foreign commerce and to exclude responsibility of the carrier to an employee for an injury not resulting from its negligence, or that of its officers, agents or other employees.

Second Employers' Liability Cases, 223 U. S. 1, 51.
New York Central R.R. v. *Winfield*, 244 U. S. 147, 149.
Nelson v. *Southern Ry. Co.*, 246 U. S. 253.
Chicago, etc., Ry. Co. v. *Bower*, 241 U. S. 470, 473.

It is conceded that the cause of action is based upon the alleged negligence of the defendant in the Province of Quebec.

It is elementary that an action for death does not exist at common law in this country, but is purely statutory.

Duggan v. *Bay State St. Ry. Co.*, 230 Mass. 370, 376.
In re Meng, 227 N. Y. 264.
Giardini v. *McAdoo*, 107 Atl. 437 (N. J.).
Colorado v. *Johnson Iron Works*, 83 So. 381 (La.).
Kerley v. *Hoehman*, 183 Pac. 980 (Okl.).
Oberstone v. *Armendariz*, 244 S. W. 644 (Tex.).

Without an exception so far as personal injury cases of this character are concerned, the courts in this country have held that a statute giving a remedy for death has no force beyond the territorial limits of the state or country by which it was enacted; *i.e.*, it has no extraterritorial effect. The same is true of an action under the common law of the state or country.

Knight v. *West Jersey R.R. Co.*, 108 Pa. St. 250.
Wall v. *Chesapeake, etc., Ry. Co.*, 290 Ill. 227.
Johnson v. *Chicago, etc., R.R. Co.*, 91 Iowa 248.
Needham v. *Grand Trunk R.R. Co.*, 38 Vt. 294.
DeHarn v. *Mexican National R.R. Co.*, 86 Tex. 68.
McDonald v. *Mallory*, 77 N. Y. 546.
Williams v. *William B. Scaife & Sons Co.*, 227 Fed. 922.
Texas & Pac. Ry. v. *Cox*, 145 U. S. 593.
Huntington v. *Attrill*, 146 U. S. 657, 669.
LeForest v. *Tolman*, 117 Mass. 109.
Young v. *Boston & Maine R.R.*, 168 Mass. 219.
Davis v. *N. Y., N. H. & H. R.R.*, 143 Mass. 301.
Gannett v. *Boston and Maine R.R.*, 238 Mass. 125, 129.

Lemieux v. *Boston and Maine R.R.*, 219 Mass. 399, 401.
Whitford v. *Panama R.R. Co.*, 23 N. Y. 465.
Beacham v. *Portsmouth Bridge*, 68 N. H. 382.
Pendar v. *H. & B. American Machine Co.*, 35 R. I. 321, 324.
Alabama, etc., R.R. Co. v. *Carroll*, 97 Ala. 126, 128.
Alexander v. *Pennsylvania R.R. Co.*, 48 Ohio St. 623, 636.
Herrick v. *Minneapolis & St. Louis Ry.*, 31 Minn. 11; 127 U. S. 210.

The right to recover damages under those statutes, as well as at common law, is usually transitory.

Dennick v. *Railroad Co.*, 103 U. S. 11.
Stewart v. *Railroad Co.*, 168 U. S. 445, 448.

"Of course the right of action could not arise under the laws of North Carolina when the causal negligence and the injury occurred in Virginia."

Seaboard Air Line v. *Renn*, 241 U. S. 290, 294.

In the case of *Spokane Inland R.R.* v. *Whitley*, 237 U. S. 487, at 494–495, the court said:

"In determining the question now presented, it is apparent that the fundamental consideration is that the right to recover damages for the killing of the decedent was created by the Idaho statute. The right could be enforced in another state, if the enforcement was not opposed to its policy (*Dennick* v. *Railroad Company*, 103 U. S. 11; *Texas and Pacific Ry.* v. *Cox*, 145 U. S. 593), but, wherever enforced, the *liability sprang from the Idaho law and was governed by it.* Where suit is brought in another jurisdiction, it has been held that such provisions of the law of the place of the wrongful act as can be deemed to be merely procedural may be treated as non-essential (*Stewart* v. *Baltimore & Ohio R.R.*, 168 U. S. 445; *Atchison, Topeka & Santa Fe Ry.* v. *Sowers*, 213 U. S. 55; *Tennessee Coal, Iron*

& R.R. Co. v. *George*, 233 U. S. 354), *but, it is clear that the obligation itself has its source in that law.* We must look to the Idaho statute to determine what the obligation is, to whom it runs, and the persons by whom or for whose benefit recovery may be had."

See also:

Slater v. *Mexican National R.R. Co.*, 194 U. S. 120, 126, 127.

Western Union Telegraph Co. v. *Brown*, 234 U. S. 542, 547.

The right of action is enforced in another state upon the theory that when a person recovers in one jurisdiction for a tort committed in another he does so on the ground of an *obligation incurred at the place of the tort* that accompanies the person of the defendant elsewhere. And the right to recover and its incidents are governed by the *lex loci* and not the *lex fori*.

Western Union Telegraph Co. v. *Brown*, 234 U. S. 542, 547.

Cuba R.R. v. *Crosby*, 222 U. S. 473, 478, 480.

Northern Pac. R.R. v. *Babcock*, 154 U. S. 190, 199.

Stewart v. *Railroad Co.*, 168 U. S. 445.

Reynolds v. *Day*, 140 Pac. Rep. 681.

Slater v. *Mexican National R.R. Co.*, 194 U. S. 120, 126.

Pendar v. *H. & B. American Machine Co.*, 35 R. I. 321.

In *Northern Pacific Railroad Co.* v. *Babcock*, 154 U. S. 190, at 197, the court said:

"The statute of another state has, of course, no extraterritorial force, but rights *acquired* under it will always, in comity, be enforced, if not against the public policy of the laws of the former. In such cases the law of the place where the right was acquired, or the liability was incurred, will govern as to the right of action;

> while all that pertains merely to the remedy will be controlled by the law of the state where the action is brought. And we think the principle is the same, whether the right of action be *ex contractu* or *ex delicto*."

While a country may treat some relations between its own citizens as governed by its own laws *in regions subject to no sovereign, like the high seas, or to no law recognized as adequate,* the general rule is that the character of an act as lawful or unlawful must be determined by the law of the country where it is done. It can not seriously be contended that the Province of Quebec has no law adequate to deal with this situation. (See *Civil Code of Province of Quebec,* Art. 1053, 1054 and 1056.)

> *American Banana Co.* v. *United Fruit Co.,* 213 U. S. 347.
>
> *United States* v. *Nord Deutscher Lloyd,* 223 U. S. 512.

The case of *Slater* v. *Mexican National R.R. Co.,* 194 U. S. 120, has long been recognized as the leading authority on this subject, and while there was a dissenting opinion filed by three of the justices who heard the case, the disagreement had to do with the character of the remedy under the foreign law, and the dissenting justices acquiesced in the majority opinion so far as it settled the question of what law would govern the substantive rights of the parties. This action was brought in the United States Circuit for the Northern District of Texas by a citizen and resident of Texas against a Colorado corporation operating a railroad from Texas to the City of Mexico, the plaintiff having been injured while in its employ by reason of the negligent act of the defendant committed in the Republic of Mexico. In passing upon the point in issue, Mr. Justice Holmes said, at pages 126–127:

> "But when such a liability is enforced in a jurisdiction foreign to the place of the wrongful act, obviously that does not mean that the act *in any degree is*

subject to the lex fori, with regard to either its quality or its consequences. . . . The theory of the foreign suit is that *although the act complained of was subject to no law having force in the forum*, it gave rise to an obligation, an *obligato*, which, like other obligations, follows the person, and may be enforced wherever the person may be found. *Stout* v. *Wood*, 1 Blackf. 71 (Ind.). *Dennick* v. *Railroad Co.*, 103 U. S. 11, 18. But as *the only source of this obligation is the law of the place of the act*, it follows that that law determines not merely the existence of the obligation, *Smith* v. *Condry*, 1 Howard, 28, but equally determines its extent. It seems to us unjust to allow a plaintiff to come here *absolutely depending on the foreign law for the foundation of his case*, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose. . . . Therefore we may lay on one side as quite inadmissible the notion that the law of the place of the act may be resorted to so far as to show that the act was a tort, and then may be abandoned, leaving the consequences to be determined according to the accident of the place where the defendant may happen to be caught. See further *Pullman Palace Car Co.* v. *Lawrence*, 74 Mass. 782, 801, 802, *et seq.; Morris* v. *Chicago, Rock Island & Pacific Ry.*, 76 Iowa, 727, 731; *Mexican National Ry.* v. *Jackson*, 89 Tex. 107; *Bruce* v. *Cincinnati R.R.*, 83 Kentucky, 174, 181; *Holmes* v. *Barclay*, 4 La. Ann. 64; *Atwood* v. *Walker*, 179 Mass. 514, 519; Minor, Conflict of Laws, 493, s. 200. We are aware that expressions of a different tendency may be found in some English cases. But they do not cover the question before this court, and our opinion is based upon the express adjudication of this court and *as it seems to us upon the only theory by which actions fairly can be allowed to be maintained for foreign torts. As the cause of action relied upon is one which is supposed to have arisen in Mexico under Mexican laws, the place of the death and the domicil of the parties have no bearing upon the case.*"

See

Mulhall v. *Fallon*, 176 Mass. 266.
Whitford v. *Panama R.R. Co.*, 23 N. Y. 465.

The Slater case has been cited with approval in many cases, of which the following are a few:

Western Union Tel. Co. v. *Brown*, 234 U. S. 542, 547.

Spokane Inland R.R. v. *Whitney*, 237 U. S. 487, 495.

Mexican Central Ry. Co. v. *Eckman*, 205 U. S. 538.

Panama R.R. Co. v. *Toppin*, 252 U. S. 308, 309.

The Hanna Nielsen, 273 Fed. 171, 173.

The Vindeggen, 252 Fed. 209.

Panama Electric Ry. Co. v. *Meyers*, 249 Fed. 19, 20.

Lauria v. *E. I. Du Pont, etc., Co.*, 241 Fed. 687, 691.

The statute of another state had, of course, no extra-territorial force; but rights acquired under it will always, in comity, be enforced, if not against the public policy of the laws of the former. In such cases the law of the place where the right was acquired or the liability was incurred will govern as to the right of action. The inquiry is, does an employee of a railroad company, injured by and through the negligence of the company, have a right to recover in a civil action damages for such injury, and, if he has, what is the extent of such right. *Where the injury for which the plaintiff sues occurred in the Province of Quebec, his right to recover damages is controlled by the laws of that Province.*

Herrick v. *Railway Co.*, 31 Minn. 11; 127 U. S. 210.

Railroad Co. v. *Babcock*, 154 U. S. 190.

In *LeForest* v. *Tolman*, 117 Mass. 109, the court held that the plaintiff could not maintain under the Massachusetts statutes an action for injuries inflicted by a dog in New Hampshire, though the dog was owned and kept in the former state and had strayed away to commit the injury.

An action will lie in Vermont under the law of the Province of Quebec for an injury suffered in the Province from the failure of the defendant to comply with a statute of the Province.

> *McLeod* v. *The Conn. & Pass. R.R. Co.*, 58 Vt. 727.

Although a civil right of action acquired or liability incurred in one state or country for a personal injury may be enforced in another to which the party in fault may have removed, or where he may be found, yet *the right of action must exist under the laws of the place where the act was done or neglect occurred.* If no cause or right of action for which redress may be had exists in the country where the personal injury was received, then there is no cause of action to travel with the person claimed to be in fault which may be enforced in the state where he may be found.

> *McLeod* v. *The Conn. & Pass. R.R. Co.*, 58 Vt. 727, 736, cited with approval in *Mexican Cent. Ry. Co.* v. *Chantry*, 136 Fed. 316, 321.

In *Cuba R.R. Co.* v. *Crosby*, 222 U. S. 473, at 478, the court said:

> "It may be that in dealing with rudimentary contracts or torts made or committed abroad, such as promises to pay money for goods or services, or battery of the person or conversion of goods, courts would assume a liability to exist if nothing to the contrary appeared. *Parrot* v. *Mexican Central Railway Co.*, 207 Mass. 184. Such matters are likely to impose an obligation in all civilized countries. But when an action is brought upon a cause arising outside of the jurisdiction, it always should be borne in mind that the duty of the court is not to administer its notion of justice *but to enforce an obligation that has been created by a different law. Slater* v. *Mexican National R.R. Co.*, 194 U. S. 120, 126. The law of the forum is material

only as setting a limit of policy beyond which such obligations will not be enforced there. *With very rare exceptions, the liabilities of parties to each other are fixed by the law of the territorial jurisdiction within which the wrong is done and the parties are at the time of doing it.* *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 356. See *Bean* v. *Morris*, 221 U. S. 485, 486, 487. That and that alone is the foundation of their rights.

The language of Mr. Justice Bradley in *The Scotland*, 105 U. S. 24, with regard to the application of the *lex fori* to a case of collision between vessels belonging to different nations and so subject to no common law, *referred to that class of cases and no others*, and was used only in coming to the conclusion that foreign vessels might take advantage of our Limited Liability Act. See also *The Chattahoochee*, 173 U. S. 540, 550. Other exceptional cases are referred to in *American Banana Co.* v. *United Fruit Co.*, *ubi supra*, such as those arising in regions having no law that civilized countries would recognize as adequate. But as to causes of action arising in a civilized country the disregard of the foreign law occasionally indicated by some English judges before the theory to be applied was quite worked out must be disregarded in its turn. The principle adopted by the decisions of this court is clear. See also Dicey, Confl. of Laws, 2d ed., 647 *et seq.*

We repeat that the only justification for allowing a party to recover when the cause of action arose in another civilized jurisdiction is a well-founded belief that it was a cause of action in that place. *The right to recover stands upon that as its necessary foundation. It is part of the plaintiff's case, and if there is reason for doubt he must allege and prove it.* The extension of the hospitality of our courts to foreign suitors must not be made a cover for injustice to the defendants of whom they happen to be able to lay hold."

The rule to which I have so constantly called attention has been rigidly applied in master and servant cases under State Employers' Liability Acts and in this connection it is to be observed that no complexities of international law have arisen. An employee who is injured in another state

can not recover under the Employers' Liability Act of his own state.

Young v. *Boston R. Co.*, 168 Mass. 219, 220.
Debevoise v. *N. Y. R. Co.*, 98 N. Y. 377.
Cinn. R. Co. v. *McMullen*, 117 Ind. 439.
Ala. R. Co. v. *Carroll*, 97 Ala. 126.
Needham v. *Grand Trunk R. Co.*, 38 Vt. 294.

It is well established by the decisions of many courts that, if the injury occurs in one state or country, and death results therefrom in another, the cause of action is regarded as having arisen in the former state or country, and is therefore governed by its laws; *i.e., the place of the death, as well as the domicile of the parties* (provided due service of process has been had on the defendant), *has no bearing upon the case, so far at least as the rights and obligations of the parties thereto are concerned.*

Slater v. *Mexican National R.R. Co.*, 194 U. S. 120, 127.
Van Doren v. *Pennsylvania R.R.Co.*, 93 Fed. 260.
Louisville & Nashville R.R. Co. v. *Williams*, 113 Ala. 402.
Derr v. *Lehigh Valley R.R. Co.*, 158 Penn. 365.
DeHarn v. *Mexican National R.R. Co.*, 86 Texas, 68.
Centofanti v. *Pennsylvania R.R. Co.*, 244 Pa. 255.

Nor is it of any consequence that the contract of hiring the deceased might have been made in the United States, where the tort was committed within the confines of another country. The cause of action sounds in tort, not contract.

Mitchell v. *St. Louis Smelting and Refining Co.*, 215 S. W. 506 (Mo. App.).
Ala. G. S. R. Co. v. *Carroll*, 97 Ala. 126.

It is of interest at this point to note that of the cases where the courts of one state or country have entertained a suit for a tort committed in another, one or both of the parties have been citizens of the state or country in which the suit was brought. In all of these cases, in spite of that fact, the courts have consistently maintained that the *lex loci* and not the *lex fori* prevails in respect to the rights and obligations of the parties. And wherever there has been an attempt—and it will appear that there have been several attempts among those cases—to maintain a suit under the *lex fori*, it has failed. It is difficult to see how such actions could have failed, if the plaintiff is correct as to his version, or rather theory, of the law, *i.e.*, that statutes of this character follow the citizens of the United States wherever they may go and establish their rights.

Panama Elec. Ry. Co. v. *Meyers*, 249 Fed. 19, 20.

In an action against a railroad company for the burning of plaintiff's bridge, which reached from a point in Canada to a point in New Hampshire, where the cause of action, had it been prosecuted in the Canadian courts, might have been barred by the Statute of Limitations, it was held that, with reference to so much of the bridge as was in Canada, the burden was on the plaintiff to show that it had a valid cause of action under the law of that country against the defendant for the injury alleged.

Connecticut Valley Lumber Co. v. *Maine Central R.R.*, 103 Atl. 263 (N. H.).

The following are some cases in which the plaintiff and the defendant were both citizens of this country and the injuries to the plaintiff were sustained either in Mexico or in Canada or in some other foreign country, and in every

case the *lex loci* was applied as the test of the liability of the defendant and the rights of the plaintiff.

Atchison, T. & S. F. Ry. Co. v. *Nichols,* 264 U. S. 348, 353.
Evey v. *Mexican Cent. Ry. Co.,* 81 Fed. 294.
Mexican Cent. Ry. Co. v. *Marshall,* 91 Fed. 933.
Slater v. *Mexican Nat'l R.R. Co.,* 194 U. S. 120.
Hanna v. *Grand Trunk R.R. Co.,* 41 Ill. App. 116.
Jones v. *Kansas City, etc., R.R. Co.,* 178 Mo. 528.
McLeod v. *The Conn. & Pass. R.R. Co.,* 58 Vt. 727.
Mexican Cent. Ry. Co. v. *Eckman,* 205 U. S. 538.
Mexican Cent. Ry. Co. v. *Chantry,* 136 Fed. 316.
Chouquette v. *Mexican Cent. Ry. Co.,* 156 Fed. 1022.
Miller v. *Canadian Northern Ry. Co.,* 281 Fed. 664, 669.
Cuba R.R. v. *Crosby,* 222 U. S. 473.
Boston & Maine R.R. Co. v. *McDuffey,* 79 Fed. 934.
Hanlon v. *Leyland & Co., Ltd.,* 223 Mass. 438.

In *Campbell* v. *Canadian Northern Ry. Co.,* 124 Minn. 245, where the plaintiff, who was an employee of a Canadian railroad corporation, was injured in the United States, while running his engine on the tracks of the Northern Pacific Railway Company, he was permitted to maintain his action under the Federal Employers' Liability Act. In that case the doctrine of applying the law of the place of the accident was carried to the extent of holding a foreign carrier liable for violation of our laws. Surely the converse should apply when a carrier of this country invades another country.

While some of the authorities cited involve penal statutes, the reasoning adopted and the result reached apply equally well to the act in question.

United States v. *Nord Deutscher Lloyd,* 223 U. S. 512.

I submit that upon the above authorities the irresistible conclusion is, that unless the law of the place where an act is done gives rise to an asserted civil liability, that liability does not exist elsewhere.

Warten v. *Brown*, 249 Fed. 48, 49.
Alabama, etc., R.R. Co. v. *Carroll*, 97 Ala. 126, 134.

And that the well-established rule of law is that we are to look to the laws of Canada for what pertains to the rights of the parties, and to our laws and practice for what applies to procedure.

Railway Co. v. *Jackson*, 32 S. W. 230, 234, 235 (Tex. Civ. App.).
Railroad Co. v. *Babcock*, 154 U. S. 190.
Herrick v. *Railway Co.*, 31 Minn. 11; 127 U. S. 210.
Knight v. *Railway Co.*, 108 Pa. St. 250.
Evey v. *Mexican Cent. Ry. Co.*, 81 Fed. 294, 305.
Dennick v. *Railroad Co.*, 103 U. S. 11, 17, 18.

A different rule, or rather the rule which the plaintiff is endeavoring to apply to this case, would result in confusion in the administration of the law and, at least, the appearance of inequality among those working under similar conditions.

Gould's Case, 215 Mass. 480.

The decisions of the English courts recognize to a limited extent this doctrine, but go one step further and hold that the wrong must be of such a character that it would have been actionable if committed in England, and the act must not have been permissible or justifiable by the law of the place where it was done.

See *Phillips* v. *Eyre*, 1870 L. R. 6 Q. B. 1.
The M. Moxham, 1876 1 P. D. 107.
Machado v. *Fontes*, 1897 L. R. 2 Q. B. 231.
The Halley, L. R. 2 P. C. 193, 203.

There is also *dictum* in *Scott* v. *Lord Seymour*, 1 H. & C. 219, to the same effect. But the tendency of late of these courts has been to establish a territorial rather than a personal law.

The former cases were not regarded with favor in *Slater* v. *Mexican National R.R. Co.*, 194 U. S. 120, and subsequent decisions of the United States courts.

See *Central Ry. Co.* v. *Chantry*, 136 Fed. 316.
Mexican Cent. Ry. Co. v. *Eckman*, 205 U. S. 538.

(2) There is nothing in the Federal Act indicative of an express intention to change this well-established rule, either from the wording of the Act, or the decisions upon it.

A statute will, as a general rule, be construed as intended to be confined in its operation and effect to the territorial limits within the jurisdiction of the lawmaker, and words of universal scope will be construed as meaning only those subject to the legislation. I will deal later on with the question of the power of Congress to pass a law of this character applicable to a cause of action arising in foreign countries.

American Banana Co. v. *United Fruit Co.*, 213 U. S. 347.
Sandberg v. *McDonald*, 248 U. S. 185, 195, 196.

The following language used by the Supreme Court in its opinion in the *Second Employers' Liability Cases*, 223 U. S. 1, "When Congress, in the exertion of a power confided to it by the Constitution, adopts an act, it speaks for all the people and all the states, and thereby establishes a policy for all [within the Union]," though the Court was simply dealing with the question of the constitutionality of the Act of 1908 so far as it involved the right of Congress to regulate commerce within the states, is of interest as

bearing upon the geographical limits of the Act as they rested in the mind of the learned justice who rendered the opinion.

It is only by giving the Act a forced and artificial construction that it may be said to embrace within its provisions a cause of action arising in another country.

In passing this Act, Congress was concerned with commerce of three different and distinct kinds: (1) commerce between the several states, (2) *commerce between one or more of the several states and a foreign nation,* and (3) commerce in the territories and the District of Columbia. The present case does not fall within the first or third class. The plaintiff's contention is that it falls within the second.

What did Congress intend to include within foreign commerce?

The Constitution of the United States provides that "the Congress shall have power . . . to regulate commerce with foreign nations and among the several states. . . ." This provision gives all the authority that Congress has over commerce, but no countenance can be given to the notion that the framers of the Constitution by such language intended that Congress so regulating commerce would do violence to those fundamental principles of international law to which I shall refer.

All legislation is *prima facie* territorial (*American Banana Co.* v. *United Fruit Co.* 213 U. S. 347, 357) and in construing the phrase "commerce between . . . any of the states, . . . and any foreign nation . . .," such fundamental rule must be borne in mind.

Can the creation of an international tort or a foreign cause of action, by the most latitudinarian construction, be embraced by the words "commercial intercourse between nations and parts of nations?" Can it in reason be maintained that to create a statutory cause of action in a foreign country is within the power to prescribe rules for the regulation of intercourse between citizens of different countries? Obviously, to do so would violate those fundamental prin-

ciples to which I shall later refer. There is not the slightest intimation in any Federal decision that I have been able to find that even indirectly suggests the possibility that a statute of this nature has any extraterritorial effect. The natural reluctance of the mind to give an interpretation of this nature to the Federal Employers' Liability Act, is, it seems to me, an admonition that it is impossible. Transportation by land or water from one state to another state, and to or from the United States from or to foreign countries constitutes interstate and foreign commerce.

Philadelphia & Southern S.S. Co. v. *Penn.*, 122 U. S. 326.

The carrying of persons and property from or to a point in one state to or from a point in another is as much commerce among the states as that which passes entirely through the state from its point of original shipment to its destination. (*Fargo* v. *Michigan*, 121 U. S. 230.) Foreign commerce means foreign intercourse, but such definition does not include within its meaning the prescribing of foreign laws.

Even in interstate commerce where no complexities of international law apply, Congress can only legislate within certain Constitutional limitations. In *Northern Securities* v. *U. S.*, 193 U. S. 197, Mr. Justice White said at page 384:

> "Congress may place restrictions and limitations upon the right of corporations created and organized under its authority to acquire, use and dispose of property. It may also impose such restrictions and limitations upon the citizen in respect to the exercise of a public privilege or franchise conferred by the United States. But Congress certainly has not the power or authority under the commerce clause, or any other provision of the Constitution, to limit and restrict the right of corporations created by the States, or the citizens of the States, in the acquisition, control and disposition of property. Neither can Congress regulate or prescribe the price or prices at which such

> property, or products thereof, shall be sold by the owner or owners, whether corporations or individuals. It is equally clear that Congress has no jurisdiction over, and cannot make criminal, the aims, purposes and intentions of persons in the acquisition and control of property, which the States of their residence or creation sanction and permit. It is not material that such property, or the products thereof, may become the subject of trade or commerce among the several States or with foreign nations. Commerce among the States, within the exclusive regulating power of Congress, 'consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, as well as the purchase, sale and exchange of commodities.' *County of Mobile* v. *Kimball*, 102 U. S. 691, 702; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 203. In the application of this comprehensive definition, it is settled by the decision of the Supreme Court that such commerce includes, not only the actual transportation of commodities and persons between the States, but also the instrumentalities and processes of such transportation."

It is apparent from the foregoing that the phrase in the Federal Employers' Liability Act "commerce between one or more of the several states and a foreign nation" is not reasonably susceptible of any extraterritorial meaning. So far as American railroads are engaged in carrying on foreign commerce, which includes the ordinary railroad activities within the borders of this country, the Act applies, but not otherwise.

The plaintiff will undoubtedly argue as he did in the Circuit Court that the word "foreign" implies commerce in another country, and can not mean anything else. I presume his argument will be that commerce does not become foreign in its character until the vehicle, be it train or boat, has passed outside of the United States. I submit that such an argument is unworthy of consideration. It has been held by our courts that commerce takes its character as interstate or foreign when it is actually shipped

or started in the course of transportation to another state or foreign country. In other words, the very second that the train upon which the plaintiff's intestate was injured left Malone, N.Y., for Montreal, Canada, the employees in that train were engaged in work in furtherance of foreign commerce and came within the purview of the Federal Act, so long as they were within the confines of the United States. Assume that this particular train had come from New York City and that Malone was merely a junction where a change of train crew was made, the carrier would be engaged in foreign commerce within the meaning of those words as used in this Act, so far as that train was concerned, from the time it left the Grand Central Station.

Railroad Commission of Louisiana v. *T. & P. Railway Co.*, 229 U. S. 336.
Coe v. *Errol*, 116 U. S. 517.
Reid v. *Railroad Co.*, 153 N. C. 490.
Diamond Match Co. v. *Outonagon*, 188 U. S. 82.
United States v. *Holliday*, 3 Wall. 417.

Foreign commerce may well be carried on in certain cases entirely within one state. For instance, where a boat from some foreign country brings into Boston freight consigned to Lowell, the carrier who transports that freight from Boston to Lowell at no time leaves the Commonwealth of Massachusetts, and yet he is engaged in foreign commerce in doing that work.

Re Wharfage Charges at Galveston, 23 I. C. C. 535.
Re Rates of Louisiana Ry. & Nav. Co., 22 I. C. C. 558.
Gibbons v. *Ogden*, 9 Wheat. 1.

"To regulate" in the sense intended, is to foster, protect, control and restrain with appropriate regard for the welfare of those who are immediately concerned and of the public at large. Obviously the Act intends to foster and

protect those who are engaged in foreign commerce within the United States. It is difficult to see how Congress could hope to control and restrain employees of common carriers engaged in the performance of their duties in foreign countries. And there is nothing in the Act which shows or permits of such an intention.

Second Employers' Liability Cases, 223 U. S. 1, 46.
American Banana Co. v. *United Fruit Co.*, supra.
Knittle v. *Ellenbusch*, 159 N. W. 893 (S. D.).

It ought to be manifest that the words "commerce between . . . any of the states and territories and any foreign nation or nations" do not mean commerce *in or within* a foreign nation, but do mean "commerce between . . . any of the states or territories and any foreign nation or nations while the parties involved in that commerce are within the territorial jurisdiction of the United States."

American Banana Co. v. *United Fruit Co.*, 213 U. S. 347, 357.
United States v. *Freeman*, 239 U. S. 117, 120.

In a statute relating to two counties the court held that the word "between" meant having one county on one side and one on the other. Such an interpretation would be fully justified in this case.

Dodge County v. *Saunders County*, 70 Neb. 442.

It can not be said, as in cases under the Workmen's Compensation Acts, to which I shall refer more in detail later in this brief, that the Federal Act should be read into an employee's contract of hire and that rights under it would therefore follow him wherever he went, because the cause of action under the Federal Act is founded upon a tort and negligence on the part of the carrier must be shown. It is in no sense contractual.

Chicago, etc., R.R. Co. v. *Bower*, 241 U. S. 470.
Nelson v. *Southern Ry. Co.*, 246 U. S. 253.

It may be noted, however, that in some states the Workmen's Compensation Acts have been held to have no extra-territorial effect.

Gould's Case, 215 Mass. 480.
Schwartz v. *India Rubber, etc., Co.*, 1912 2 K. B. 299.

Section 1 of the Federal Act applies to carriers engaged in the transportation of persons and property *from adjacent foreign countries into* the United States as well as from the United States *to an adjacent foreign country*. This language would appear to establish beyond reasonable doubt a judicial determination of the geographical limits of the Act.

Galveston, etc., Ry. Co. v. *Woodbury*, 254 U. S. 357.
Thornton on Federal Employers' Liability Act, p. 44.

Assume for the purpose of argument that the plaintiff's contention is sound, what would be the practical result? It would be absurd to say that the test of the application of the Act is the direction of the movement, rather than the nature of the transportation as determined by the field of the carriers' operation. See *Galveston, etc., Ry. Co.* v. *Woodbury*, supra, at page 359. Therefore it would be of no importance whether the train was going into Canada or coming from Canada. The natural result would be that the employees on a train leaving Montreal for New York would come within the purview of the Federal Act during a journey of several hundred miles through the Dominion of Canada, and if they received injuries by reason of the negligent act of the carrier before the train had crossed the international border into the United States, they would have to sue under the Federal Act, which is the sole and exclusive remedy wherever it prevails. Would it be contended that such an action could be maintained in the

Canadian courts? I submit that such a result would be obnoxious to the principles of international law and entirely untenable.

Pryor v. *Williams*, 244 U. S. 43, 46.
Erie R.R. Co. v. *Winfield*, 244 U. S. 170, 172, 174.
New York Central R.R. Co. v. *Tonsellito*, 244 U. S. 360, 362.
Cruzan v. *New York Central, etc., R.R. Co.*, 227 Mass. 594, 596.

The fact that both the carrier and the employee were citizens of the United States, or that the contract of employment was made here, would in no way alter the situation.

Ala. G. S. R. Co. v. *Carroll*, 97 Ala. 126.
Slater v. *Mexican National R.R. Co.*, 194 U. S. 120, 126.
Whitford v. *Panama R.R. Co.*, 23 N. Y. 465, 470.

It has been held that the Act applies to employees of foreign carriers when in the United States, irrespective of their citizenship. It follows that the right does not rest on the terms of the contract of employment.

Campbell v. *Canadian Northern Ry. Co.*, 124 Minn. 245.

In *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, at 213, in commenting upon the purpose of the Federal Act, the court said: "Evidently the purpose was to prescribe *a rule applicable where the parties are engaging* in something having direct and substantial connection with railroad operations. . . ." It is out of reason to say that Congress was endeavoring to lay down a rule applicable to foreign countries.

Another important point to have in mind is the provisions of Section 5 of the Act prohibiting contracts, rules,

regulations or devices exempting the carrier from liability. It is too clear to require argument that Congress could not interfere with the making of contracts, rules or regulations in the Dominion of Canada, whether the parties were citizens of the United States or not. Congress could not prevent the making of such contracts in other jurisdictions. If they saw fit to do so, foreign countries could continue to permit such contracts, rules or regulations, and Congress would be helpless to prevent it. This again illustrates very clearly that it was not intended by Congress that this Act should have extraterritorial force.

Patterson v. *Bark Eudora*, 190 U. S. 169, 196.

In *Erie R.R. Co.* v. *Winfield*, 244 U. S. 170, at 172, the Court, in construing the Act, said: "The Federal Employers' Liability Act establishes a rule or regulation which is intended *to operate uniformly in all states*. . . ." The words underlined fix a very definite limitation upon the scope of the Act. While it may be said that the court was then dealing with commerce between the states, rather than foreign commerce, I submit that the rule used would apply equally well to both. In this connection, it is important to note that Section 1 of the Act does not in any way separate interstate and foreign commerce, nor does it attempt to distinguish the field of operation. And yet under Section 2, Congress deals exclusively with commerce in the territories. It is clear under Section 1 of the Act that Congress was dealing with commerce *in* as well as *between* the states, so far as that *in* the states was related to or a part of interstate or foreign commerce.

The Federal Act makes negligence a test—not of the applicability of the Act, but of the carrier's duty or obligation to respond pecuniarily for the injury. Whether and in what circumstances railroad companies engaging in interstate or foreign commerce shall be required to compensate their employees in such commerce for injuries sustained

therein are matters in which *the Nation as a whole is interested.*

New York Central R.R. Co. v. *Winfield,* 244 U. S. 147, 149, 150.
Baltimore & Ohio R.R. Co. v. *Baugh,* 149 U. S. 368, 378–379.
Second Employers' Liability Cases, 223 U. S. 1, 51.

In construing an act of Congress, it is very often of assistance in arriving at the true interpretation to examine the reports of the committees in the two branches of Congress having the bill in charge.

Paine Lumber Co. v. *Neal,* 244 U. S. 459, 484.

The Federal Act was drafted and passed shortly following a message from the President advocating an adequate *national law* covering all such injuries and leaving to the action of the several states only the injuries occurring in intrastate employment.

Cong. Rec., 60th Cong., 1st Sess., 1347.

And the reports of the congressional committees having the bill in charge disclose, without any uncertainty, that it was intended to be very comprehensive, to withdraw all injuries to railroad employees in interstate commerce *from the operation of varying state laws* and to apply to them a *national law having a uniform operation throughout the states.*

House Report No. 1386.
Senate Report No. 460, 60th Cong., 1st Sess.

Thus, in the House Report it is said:

> "It [the bill] is intended in its scope to *cover all commerce to which the regulative power of Congress extends* . . . and by this bill it is hoped to fix a uniform rule of liability *throughout the Union* with reference to the liability of common carriers to their employees. . . .

A Federal statute of this character will supplant the numerous state statutes on the subject so far as they relate to interstate commerce. It will create *uniformity throughout the Union*, and the legal status of such employer's liability for personal injuries instead of being subject to numerous rules will be fixed by one rule *in all the states.*"

In *North Carolina R.R. Co.* v. *Zachary*, 232 U. S. 248, 256, it is held that where it appears that the injury occurred while the carrier was engaged and the employee employed in interstate or *foreign commerce*, the Federal Act governs *to the exclusion of the state law.* Would it be contended that the Federal Act excludes the law of Canada?

See on same doctrine:

Wabash R.R. Co. v. *Hayes*, 234 U. S. 86, 89.
N. Y. C. R.R. Co. v. *Winfield*, 244 U. S. 147, 151.

Thornton, in his treatise on the Federal Employers' Liability Act, at page 44, says: "Therefore, any railroad company carrying commercial products from one state to another, or from a state to a territory or *vice versa*, or from a state to the District of Columbia or *vice versa*, or from a state or territory *to* a foreign nation, as *to* Canada or Mexico, or *to* British Columbia, comes within its provisions."

Roberts, in his work on the Federal Liability of Carriers, at page 712, commenting upon the effect of the Act, says: "It will create *uniformity throughout the union*, and the legal status of such employer's liability for personal injuries, instead of being subject to numerous rules (statutes of the several states), will be fixed by one rule *in all the states.*"

Roberts, in referring to the scope of the Act, says at page 739 of his book, "Carriers engaged in foreign commerce *while within the boundary of the United States* are included in the Act as well as carriers engaged in interstate commerce." He cites no authorities in support and apparently has reached that conclusion upon the same line of

reasoning I have adopted in this brief. It might not be amiss to point out that the principles involved are so elementary and have been laid down by the courts of the United States and the several states over such a long period of time, that everybody has apparently adopted them as final and has governed themselves accordingly. That would account for the total lack of any decision upon this precise question. I have cited many cases brought to recover damages for a tort committed in another country and without an exception they have all been brought under the law of the place of the accident.

There is still another indication of the attitude of this Court upon the question of the scope of this Act. This Court has decided that in construing the Act decisions of the national courts control, and the principles of the common law as interpreted and applied in the Federal Courts prevail.

Central Vermont Ry. v. *White*, 238 U. S. 507.
Great Northern Ry. v. *Wiles*, 240 U. S. 444.
Southern R.R. Co. v. *Gray*, 241 U. S. 333.
Seaboard Air Line v. *Horton*, 233 U. S. 492.

It needs no argument to convince one that the decisions of our Federal Courts could not prevail in the courts of foreign countries, except as a matter of international comity. It appears ridiculous after a careful analysis of the Federal Act and the decisions construing it, for any one to claim that Congress intended it to have extraterritorial force. I submit that the reasoning and the authorities given above permit of no such interpretation.

A strict construction of this Act, which alters the common law rule, is required.

Sewall v. *Jones*, 9 Pick. 412 (Mass.).
United States v. *Fisher*, 2 Cranch. 358.
Shaw v. *Railroad Co.*, 101 U. S. 557.

(3) Congress has no power to enact a law that all claims of this nature shall be subject to the Federal Act, wherever occurring.

Within the term "persons employed in such commerce" are included all those persons who could be so included within the constitutional power of Congress.

Employers' Liability Cases, 207 U. S. 463.

Under this construction the inquiry becomes whether Congress could constitutionally have passed a statute regulating the relation between a carrier master and a servant who was injured while both were engaged in foreign commerce, but where the injuries were received while in a foreign country.

Colasurdo v. *Central R.R. of N. J.*, 180 Fed. 832.
Horton v. *Oregon, Wash. R.R., and Navigation Co.*, 72 Wash. 503.
Montgomery v. *Southern Pacific Co.*, 64 Ore. 597.

As I have pointed out earlier in this brief, the place of the contract of hire, and the domicile of the parties are of no importance upon the issue we are herein dealing with.

Mitchell v. *St. Louis Smelting and Refining Co.*, 215 S. W. 506 (Mo. App.).
Slater v. *Mexican National R.R. Co.*, 194 U. S. 120, and other cases cited above.

Acts of Congress do not, and were not intended to, operate beyond the limits of the United States except in rare instances to which I later will call attention. International law alone would forbid it. The authority of a nation within its own territory is absolute and exclusive. (Digest Int. Law Wharton, p. 1.) Any restriction upon this sovereignty, when such restriction comes from a foreign power, implies a transfer *pro tanto* of such sovereignty to such power. This full and absolute territorial jurisdiction being alike

the attribute of every sovereign, and being incapable of conferring extraterritorial powers, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another, and being bound by obligations of the highest character not to degrade the dignity of his nation by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belong to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him." (Marshall, C. J., in *Schooner Exchange* v. *McFadden*, 7 Cranch. 137.) Therefore it is fundamental that ordinarily the municipal laws of one nation do not extend, in their operation, beyond its own territory. "As a general proposition," writes Wharton (Dig. Int. Law, p. 33), "the laws of one country have in themselves no extraterritorial force and whatever force they are permitted to have in foreign countries depends upon the comity of nations, regulated by a sense of their own interests and public convenience." (Citing *LeRoy* v. *Crowninshield*, 2 Mason 151.)

The power of Congress to deal with the subject comes from its power to regulate commerce between the States and foreign nations.

Michigan Central R.R. v. *Vreeland*, 227 U. S. 59.

Within the field of authorized congressional action the Federal power must, in the nature of things, *be supreme in all parts of the United States.* "This Constitution and the laws of the United States which shall be made in pursuance thereof shall be the supreme law of the land; and the judges in every state shall be bound thereby."

Art. VI, par. 2, Const. U. S.
Cooley v. *B'd of Wardens*, 12 Howard, 299, 318.
Wisconsin v. *Chicago, M. & St. P. Ry. Co.*, 117 N. W. 686 (Wis.).

But the Constitution of the United States has no extra-territorial effect and is inoperative beyond the limits of the country.

In re Ross, 140 U. S. 453, 464.
Dorr v. *United States*, 195 U. S. 138.
Downes v. *Bidwell*, 182 U. S. 244.
Tennessee v. *Davis*, 100 U. S. 257, 263.
St. Louis, etc., R.R. Co. v. *Vickers*, 122 U. S. 360.

The Supreme Court said in *In re Ross*, 140 U. S. 453, at 464, that "By the Constitution a government is ordained and established 'for the United States of America,' *and not for countries outside of their limits.* The guarantees it affords against accusation of capital or infamous crimes, except by indictment or presentment by a grand jury, and for an impartial trial by a jury when thus accused, *apply only to citizens and others within the United States*, or who are brought there for trial for alleged offences committed elsewhere, and not to residents or temporary sojourners abroad. *Cook* v. *United States*, 138 U. S. 157, 181. *The Constitution can have no operation in another country.*"

The Government of the United States can claim no powers which are not granted to it by the Constitution; and the powers actually granted must be such as are expressly given, or given by necessary implication.

Martin v. *Hunter*, 1 Wheat. 304, 326.

In *United States* v. *Nord Deutscher Lloyd*, 186 Fed. 391; 223 U. S. 512, the court held that the Immigration Act applied only to acts done within the United States, "since to construe it as applicable to acts occurring wholly within foreign territory would render it violative of international law."

The general rule is that legislative power is territorial

and no duties can be imposed by statute upon persons who are within the limits of another state or country.

Mulhall v. *Fallon*, 176 Mass. 266, 268.
Lumb v. *Jenkins*, 100 Mass. 527.
Dennick v. *Central R.R.*, 103 U. S. 11.
Sandberg v. *McDonald*, 248 U. S. 185, 195, 196.

The Government of the United States is supreme within its sphere of action; and its laws, when made in pursuance of the Constitution, *form the supreme law of the land.*

McCullouch v. *Maryland*, 4 Wheat. 316, 405.
Second Employers' Liability Cases, 223 U. S. 1, 54, 57.
Claflin v. *Houseman*, 93 U. S. 130, 136, 137.

Laws of a nation do not, as a general proposition, follow the individuals of such nation into the jurisdictional limits of another nation, so as to attach themselves to acts done in such other nation.

Roche v. *Washington*, 19 Ind. 53, 59.
Polydore v. *Prince*, 1 Ware, 402, 410.
Fisher v. *Fielding*, 67 Conn. 91, 104.
Carlisle v. *United States*, 16 Wall. 147.
In re Waite, 99 N. Y. 433.
King v. *Sarria*, 69 N. Y. 24, 31.

And every person who is found within the limits of a government, whether for temporary purposes or as a resident, is bound by its laws.

Brown v. *Duchesne*, 19 Howard, 183, 195.
Gibbs v. *Queen Ins. Co.*, 63 N. Y. 114.
Caldwell v. *Vanvlissengen*, 9 Hare, 415, 425.

The language of the Constitution itself "for the United States of America" would seem to foreclose any other conclusion. It is obvious that the Constitution covers "the

width and breadth" of the United States, and no more. Congress derives its right to enact laws solely from the expressed or implied powers contained in the Constitution. It necessarily follows that the statute thus enacted can be no broader than the source from which it derives its authority. I submit that the conclusion is irresistible that, with a very few exceptions, Congress has no power to enact laws having extraterritorial power or effect, and such an attempt on the part of Congress should not be read into an Act unless it expressly appears therein. It is elementary that every nation may rightfully exercise jurisdiction over all persons within its limits in respect to matters purely personal.

Story, Conflict of Laws, s. 542.
McLeod v. *Railroad* Co., 58 Vt. 727, 734.

There is necessarily and tacitly attached to every enactment declaring a particular act unlawful the idea *that the act shall be one committed within the sovereignty of the sovereign making the enactment.* Such must be the case here. As the United States could not make it unlawful for a British master to pay seamen on a British ship advance wages in Great Britain, it is only reasonable to intend that the act, with this idea in mind, not only may be, but must be read thus: "That it shall be and is hereby made unlawful in any case to pay any seaman wages (anywhere within the territorial jurisdiction of the United States) in advance of the time," etc.

American Banana Co. v. *United Fruit Co.*, 213 U. S. 347, 357.
United States v. *Freeman*, 239 U. S. 117, 120.

Section 1 is valid, so far as it applies to foreign railroad corporations employing citizens of a foreign country while in this country, as a condition upon the entry of foreign carriers into the United States. The power to impose such conditions is an incident to the sovereignty of the nations.

The obvious inference is that Canada had the absolute right to lay down the conditions subject to which American railroads and their employees would be permitted to enter that jurisdiction. Among those conditions, as appears from the many decisions of our courts, some of which have been cited before in this brief, is the power to fix the rights, liabilities and obligations of the carrier and its employees, while within its territorial jurisdiction.

Vattel, Law of Nations (Chitty Ed. 1863) p. 40.
Patterson v. *Bark Eudora*, 190 U. S. 169.
Oceanic Steam Navigation Co. v. *Stranahan*, 214 U. S. 320.
Butfield v. *Stranahan*, 192 U. S. 470, 492, 493.
Weber v. *Freed*, 239 U. S. 325, 329.
Turner v. *Williams*, 194 U. S. 279, 289.

(4) To construe the Federal Act as having extraterritorial effect would be contrary to International Law.

Equally fundamental is the doctrine that an Act of Congress should never be construed contrary to international law, if any other possible construction is available and that international law is part of the law of the land. Such were the views of Chief Justice Marshall as expressed in *The Charming Betsey* (2 Cranch. 64). Mr. Justice Gray in a comparatively recent decision (*The Paquete Habana*, 175 U. S. 677, 700), said, "International law is a part of our law, and must be ascertained and admitted by the courts of justice of appropriate jurisdiction. . . . For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the custom and usages of civilized nations."

Professor Roscoe Pound in an article written for the Harvard Law Review (31 Harvard Law Review, 383), writes as follows: "The view which has prevailed, however, is that the courts are to prevent interference of legislation

with international law by interpretation; that to avoid a conflict between international law and a statute, the courts will resort if need be to strained and forced constructions."

My reasons for saying that it would violate principles of international law to construe the Federal Employers' Liability Act in such a way as to give it an extraterritorial effect are that: *"The civil liability arising out of a wrong derives its birth from the law of the place where the wrong was committed and its character is determined by that law."* (Wheat Int. Law, p. 232, 5th Eng. Edition.) *Hence, if an employee of an American railroad is injured in a foreign country his rights must necessarily be determined by the law where the wrong was committed. Congress at least at the present time is wholly without authority to declare what shall be a tort in another country, for it is fundamental in Anglo-American jurisprudence that the power of a sovereign is territorially exclusive.* Story, Conflict of Laws, 8th Ed. Sec. 318 *et seq.*

In *Cunard S.S. Co.* v. *Mellon*, 262 U. S. 100, Mr. Justice Devanter said:

> "The merchant ship of one country voluntarily entering the territorial limits of another subjects herself to the jurisdiction of the latter. The jurisdiction attaches in virtue of her presence, just as with other objects within those limits. During her stay she is entitled to the protection of the laws of that place and correlatively is bound to yield obedience to them. Of course, the local sovereign may out of considerations of public policy choose to forego the exertion of its jurisdiction or to exert the same in only a limited way, but this is a matter resting solely in its discretion. The rule, now generally recognized, is nowhere better stated than in The Exchange, 7 Cranch. 116, 136, 144 (3 L. Ed. 287), where Chief Justice Marshall, speaking for this court, said:
>
> 'The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its

sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.

'All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source. . . .

'When private individuals of one nation spread themselves through another as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects thus passing into foreign countries, are not employed by him, nor are they engaged in national pursuits. Consequently there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, and no one motive for requiring it. The implied license, therefore, under which they enter can never be construed to grant such exemption.'"

The most valuable contribution to the subject under discussion, which I have found, is that contained in Prof. Meili's work, "International Civil and Commercial Law." Under the title "Torts" he writes as follows:

"D. Obligations '*ex delicto*'

128. The Authoritative Principle Applicable to Torts. P. Fiore, "De la loi qui, d'après les principles du droit international, doit régir les engagements qui se forment sans convention," in Journal de dr. i., XXVii, pp. 49, 717.

1. The law generally prevailing upon the Continent of Europe makes the *lex loci actus* govern obligations in tort.

The result of this rule is twofold, viz:—

(*a*) that a claim cannot be maintained unless it be actionable at the place where the act complained of occurred, although the *lex fori* would have considered it actionable;

(*b*) that a claim can be maintained if it be recognizable by the *lex loci actus*, though not by the *lex fori*.

2. Obligations arising out of civil tort rest upon a violation of those rules of law which govern the conduct of each individual toward every other person, in his general intercourse with the world. It is obvious that the will of the parties cannot form a standard; neither can the *lex patriae* or *lex domicilii*. It is solely the law of the momentary sojourn which controls. Zitelmann (i. pp. 110–112) speaks here of the violation of territorial sovereignty."

"How correct it is to lay down, not the *lex fori*, but the *lex loci actus*, as theoretically authoritative, will be seen from a special case in the class of actions which, in the Roman law, are known as *de pauperie*. According to the law of Massachusetts, the owner of a dog is liable for double the amount of damage caused by it (Wharton, s. 478). If, then, the dog bites or injures persons in another state, the owner could not be mulcted in these extraordinary damages, even though the action were brought in Massachusetts.

European theory and judicature are now again uniformly of the view that torts and *quasi*-torts are determinable by the *lex loci actus* (*lex delicti commissi*). There is often a special forum prescribed for such actions. The law of the place of commission is also authoritative upon whether such claims may be assigned and upon what grounds the cause of action abates.

(*a*) The German Imperial Court has frequently stated that the legal results of a tort are governed by the law of the place where it is committed (Civ. Cases, vii, p. 378; xxxvi, p. 28).

(*b*) The decisions of Swiss courts are also in favor of the view (H. E., xi, p. 197). The court in this case says:—

'With the exception of the criminal punishment to be given in case of unlawful acts, *public* interests

are no more affected by the legal relationship of the guilty to the injured party than they are in determining the legal results of a breach of contract. . . . The more recent doctrine has definitely given up Savigny's view, and has declared in favor of the application of the law of the seat of the act, in regard to the results of a tort in civil law.'

3. The Belgian Draft Code proposes the following rule in Art. 8:—

'*Quasi*-contracts, civil torts, and *quasi*-torts are governed by the law of the place where the act, which is the basis of the obligation, occurred.' "

It is well stated that common law torts, and probably statutory torts not in derogation of any settled rule of the common law, may be redressed as well in the courts of a state in which the wrong was not committed as in that of the *lex loci actus*.

LeForest v. *Tolman*, 117 Mass. 108.
Needham v. *Grand Tr. R. Co.*, 38 Vt. 294.
Knight v. *W. J. R.R. Co.*, 108 Pa. St. 250.
Phillips v. *Eyre*, L. R. 4 Q. B. 225, 239; L. R. 6 Q. B. 1.

It is generally stated, especially by English authors, that in order that an action for tort be maintainable, the *lex fori* and the *lex delicti commissi* "must be in accord" in recognizing the act sued upon as wrongful and actionable. This became converted in America into a doctrine that only common law torts will be actionable outside of the state in which they are committed, and that the courts will not recognize rights of action in tort growing out of foreign statutory law.

Richardson v. *N. Y. C. R. Co.*, 98 Mass. 85.
Buckles v. *Ellers*, 72 Ind. 221.
Woodward v. *M. S. R. Co.*, 10 Ohio St. 121.

In the Ohio and Massachusetts cases cited, the action was brought for the death of the plaintiff's intestate, the

plaintiff being authorized to bring the suit only by the law of the forum. This objection was finally disregarded by *Leonard* v. *Columbia S. N. Co.*, 84 N. Y. 48, and the decision was approved later by the Supreme Court of the United States, where it was said that—

> "whenever, by either the common law or the statute law of a state, a right of action has become fixed and a legal liability incurred, that liability may be enforced, and the right of action pursued in any court which has jurisdiction of such matters, and can obtain jurisdiction of the parties." (Miller, J., in *Dennick* v. *Central R. Co.*, 103 U. S. 11.)

The court entirely disregarded the distinction between common law and statutory torts, and its decision may be based upon the same principle which, as we have seen, prevails upon the Continent, that a right of action for a tort given by the law of the foreign state will be redressed in the local. See, in harmony with this doctrine:

Usher v. *R.R. Co.*, 126 Pa. St. 207.
Herrick v. *R.R. Co.*, 31 Minn. 11.
Laird v. *R.R.*, 62 N. H. 254.
Burns v. *R.R. Co.*, 113 Ind. 169.

The English rule is opposed to what thus seems to be the tendency now prevailing in the American cases, and holds that unless the injury is wrongful and actionable, both by the foreign law and the law of England, no action can be maintained.

The Halley, L. R. 2 P. C. 193.
Rex v. *Topham*, 4 T. R. 126.
Reg. v. *Labouchere*, 12 Q. B. D. 320.

There are also some American cases which incline to the earlier view.

Ash v. *R.R.*, 17 Md. 144.
R.R. v. *McCormick*, 71 Tex. 660.
Oates v. *R.R.*, 104 Mo. 514.

How immaterial it is that the law of the forum should be like that of the foreign state is shown by the fact that the negative phase of the rule is everywhere recognized; that is to say, that unless the act is considered wrongful and actionable in the country where it was performed, no action may be maintained in the local state, even though a remedy would have been afforded had the act occurred there.

Whitford v. *Panama R. Co.*, 23 N. Y. 465.
Carpenter v. *R.R.*, 72 Me. 388.
LeForest v. *Tolman*, 117 Mass. 109 (which was the case of the dog cited by the author, *supra*).
Phillips v. *Eyre*, L. R. 4 Q. B. 225; L. R. 6 Q. B. 1, 29.
Dobree v. *Napier*, 2 Bing. N. Cas. 781.

The theory of territorial sovereignty has been too long established as a principle of international law to admit of question at this time. Rights created by one state may be recognized and enforced by another state at its pleasure, and likewise a status attached to a person by one state may be recognized by another state, into which that person may travel, at the pleasure of the latter state; but as law the mandates of the sovereign of a given state can have no effect beyond the territorial limits to which his rule is extended. (*Quong Ham Wah Co.* v. *Ind. Acc. Com.*, 184 Cal. 126.) When, therefore, it is said that a statute, such as the Workmen's Compensation Act, has an extraterritorial effect, it can not mean that the law does, or attempts to, create rights abroad; it can only mean that an act occurring beyond the geographical limits of the state is recognized as the basis for the creation, or condition for the enforcement, of a right created and enjoyed within this state. *But tort is not an element in the liability created by the Workmen's Compensation law.* The basis of this legislation is liability without fault. "It provides an incident to the

employment which is likened to a contractual obligation, even where the Workmen's Compensation law is not of the class called optional." (Per Brandeis, J., in *Washington* v. *Dawson & Co.*, 264 U. S., at pp. 233, 234.) I shall refer more specifically to this subject later on.

It is fanciful, it seems to me, to assume, in view of the fundamental principles to which I have called attention, that Congress intended American railroads to carry the Federal Employers' Liability Act with them when they operated in a foreign country.

As early as 1861 the precise question was exhaustively discussed by the New York Court of Appeals in the leading case of *Whitford* v. *Panama R.R. Co.*, 23 N. Y. 465.

It was claimed by the plaintiff that the New York death statutes were applicable in an action brought in the state court for injuries happening in New Granada caused by a New York railroad corporation operating there.

In the course of his opinion Mr. Justice Denio said at page 470:

> "I have thus far assumed without a formal statement of the principle that the statutes referred to have no force beyond the limits of the State of New York. This is an elementary doctrine and the contrary was not insisted upon as a general rule on the argument. The laws of New York have no greater operation, in respect to transactions which take place wholly within the territories of New Grenada, than the laws of that republic have in regard to New York transactions. It is no doubt within the competency of the legislature to declare that any wrong which may be inflicted upon a citizen of New York abroad, may be redressed here according to the principles of our law, if the wrongdoer can be found here, so as to be subjected to the jurisdiction of our courts; but as we could not by any legislation of this kind put an end to the liability of the party to the *lex loci*, or divest the foreign government of its jurisdiction over the case, such a statute would rarely be just in its operation, and would be more

likely to lead to confusion and oppression than to any beneficial results. Hence, legislation of the kind suggested has not found any place in the statute books of modern nations, except in the case of laws respecting the army and navy, which, when operating abroad, must of course be governed by the laws enacted by the government of the country which sends them forth, and except also in regard to foreign commerce prosecuted in our own vessels. In such cases the fleets and armies, and ships of commerce carry with them the nationality which originally belonged to them. *Prima facie* all laws are coextensive, and only coextensive with the political jurisdiction of the law-making power. (Story's Confl. Laws, s. 18–20; *United States* v. *Bevans*, 3 Wheat. 336, 386; 3 Dall., 320—Translations from Huberus; *Bank of Augusta* v. *Earle*, 13 Pet. 519.) This limitation upon the operation of the laws of a country is quite consistent with the practice which universally prevails, by which the courts of one country entertain suits in relation to causes of action which arise in another country, when the parties come here so as to be made subject to their jurisdiction. Whatever liability the defendants incurred by the laws of New Grenada, by the act mentioned in the complaint, might well be enforced in the courts of this State; the defendant as a domestic corporation being readily compellable to answer here. But the rule of decision would still be the law of New Grenada, which the court and jury must be made acquainted with by the proof exhibited before them.

"I have, thus far, omitted to notice the argument of the plaintiff's counsel arising out of the circumstance that the defendants are a corporation created by the laws of the State of New York, for the purpose of constructing and running a railroad in Central America. He deduces from that fact the conclusion that they are fully subject to our laws for acts done in all places, and especially in the jurisdiction in which the principal object of their incorporation is carried on. On the contrary, I have applied to them the same rules which would have governed a natural person going from this State to conduct a business enterprise upon the isthmus of Panama; and I think there is no distinction,

so far as concerns this question, in the two cases. There is no pretense that the government of New Grenada has ceded to the State of New York any part of her jurisdiction or sovereignty over the territory occupied or used by the railroad company. The act incorporating the defendants suggests that three of the corporators—Aspinwall, Stephens and Chauncey—had obtained a grant of a right to construct the railroad from the New Grenadian government, and the company was authorized to purchase from these persons the rights so obtained; but there is no proof, or any reason to believe, that the grant was intended to transfer any political or judicial rights whatever. All which can be inferred from the statements in the statute is, that the local government had conferred upon these individuals the right to construct and operate a railroad, and to purchase and hold lands for that purpose, notwithstanding their alienage. If Mr. Aspinwall and his two associates had constructed and had run the road under their grant, there could, of course, be no pretense for exempting them from the operation of the laws of the country, or for applying to their transactions in that locality the laws of New York, any more than there would be for attaching the same consequences to the acts of any other citizen of New York who should go to a foreign country in the pursuit of his own private business. It would be the common case of persons leaving their own country to transact business in another. *No one would pretend that they carried the laws of the country of their origin with them.* But the legislature of this State consented to incorporate these grantees and other persons who had associated with them, in order that the company thus formed might concentrate the necessary capital to prosecute the work, and be enabled conveniently to transact their business by maintaining a perpetual succession, using a common name, and exercising the other attributes of a corporation. The legislature did not profess to confer upon them any rights in New Grenada, or to exempt them from any liabilities which would attach to natural persons there, or to retain over them any jurisdiction or control in respect to their liabilities to persons with whom they might come in contact in the course of their business in New Grenada."

"It would be easy to illustrate the correctness of these positions by referring to the preposterous results which would follow from a different rule. Suppose the government of New Grenada to have enacted that the proprietors of a railroad company should not be responsible for the negligence of its servants, provided there was no want of due care in selecting them; it could not be pretended that its will could be set at naught by prosecuting the corporation in the courts of another State where the law was different. Or suppose that government had passed a statute like ours, except that the amount which might be received was unlimited, no one, I presume, would deny that the full amount of damages which could be proved might be recovered, though it might exceed the limit in our statute, in whatever court the suit might be brought. The true theory is, that no suit whatever respecting this injury could be sustained in the courts of this State, except pursuant to the law of international comity. By that law foreign contracts and foreign transactions, out of which liabilities have arisen, may be prosecuted in our tribunals by the implied assent of the government of this State; but in all such cases we administer the foreign law as from the proofs we find it to be, or as without proofs we presume it to be."

In the course of his opinion, Mr. Justice Davies said:

"Keeping in view the proposition, which it is deemed has been established, that no such action could have been maintained at the common law, on what principle is it, that for the act of the defendants, committed in New Grenada, they can be made liable, by virtue of the statute of the State of New York, which has no extraterritorial vitality, and is of no effect whatever there? Supposing the defendant was a natural person, and the owner of the Panama Railroad, and had sold to the plaintiff in the City of New York, a ticket for the objects stated in the complaint, and had imposed on him the duties alleged to have been assumed by the defendants, and the injury had happened as in the present case, can it be argued that the defendant would have been liable? If he could,

it would depend on the circumstance, that the duty was assumed in the State of New York, and whatever liabilities attached to the assumption of like duties in this State, to be performed here, by the laws thereof, attached equally to the same duties to be discharged and performed in other States and territories. Supposing the administrator of the intestate had sought to enforce his claims in another State than this, where no statute like ours was in force, he would have to maintain and establish that the statute of this State must be recognized and enforced in the forum which he had sought. Suppose a similar transaction to this had taken place in England, and the person on whom the duty safely to transport, rested, had resided there after the passage of the act 9 and 10 Victoria, and a similar accident had happened, and the administrator had sought in his remedy in the courts of this State happening to find the party liable under this statute within this State, can it be seriously maintained that by virtue of the act 9 and 10 Victoria, he could recover here? I suppose clearly not; and these illustrations show that the plaintiff cannot, in this action, recover by virtue of our statute, for injuries which occurred to his intestate, happening where that statute had no force. It is unnecessary to add, that a statute of a State of this Union has no extra-territorial effect. And while all transactions occurring here, or liabilities for acts done here, are to be affected and governed by our local law, no such result follows transactions occurring in a different State or territory where those laws are unknown, where they are entirely inoperative, and where different rules applicable to the subject-matter may prevail."

The question of whether or not an act gives rise to a civil liability for tort depends upon the law of the place where it is committed. (Meili, Int. Law, *supra; Can. Pac. R. Co.* v. *Parent*, 24 Quebec, K. B. 193; *Phillips* v. *Eyre*, 6 Q. B. 1.) In the United States, in other than penal actions, the general rule is that the court will, if it has jurisdiction of the necessary parties and can do substantial justice between them in accordance with its own forms of pro-

cedure, enforce the foreign law if it is not contrary to the public policy of the forum. (Vide, *Slater* v. *Mex. Nat. R.R. Co.*, 194 U. S. 120.) The carefully considered case of *Lauria* v. *DuPont de Nemours*, 241 Fed. 687, is of interest. Also the following authorities:

Beacham v. *Portsmouth Bridge*, 68 N. H. 382.
Pendar v. *H. & B. Mach. Co.*, 35 R. I. 321.
LeForest v. *Tolman*, 117 Mass. 109.
Young v. *Boston & Maine*, 168 Mass. 219.
Lowe v. *Steiger*, 233 Mass. 600.
Johnson v. *Phoenix Bridge Co.*, 197 N. Y. 316.

In this last case cited the Court at page 319 said:

> "The action authorized by the Canadian Statute is maintainable in this state. . . . It is dependent upon the provisions of the statute of that province in which the accident occurred, and that statute governs and controls the action except in mere matters of procedure and detail."

There is no conflict in the decided cases on the point that so far as the right of action is concerned, *it must stand if at all on the statute of the state where the injury occurred and not of the state where the redress is sought* (12 C. J., p. 454) and that a statute providing a right of action for personal injury has no extraterritorial force and does not confer a right of action for an injury inflicted in another state.

I call attention to the case of *Kiefer* v. *Grand Trunk R. Co.*, 12 App. Div. (N. Y.) 28; affd. 153 N. Y. 688 (cited in *Johnson* v. *Phoenix Bridge Co., supra*). There plaintiff brought an action to recover damages for the negligent killing of her son while he was riding as a passenger upon the defendant's railroad in the Province of Ontario. In the course of its opinion in the Appellate Court it is stated as follows:

> "The plaintiff would have no cause of action whatever, in this state, but for that which was created by

the statute of another country. It would seem to follow, therefore, that upon well-recognized principles of comity, such right, if asserted here must be asserted under the law of the place where the right arose. A different rule would soon destroy that spirit of comity which ought to exist between different states and countries. . . . Would it be in harmony with any idea of international comity to have allowed her to bring her action in this state after the expiration of the period mentioned, because our statute extends the time for bringing the same to two years after the decedent's death."

The Federal Courts have consistently held without exception, as I have stated earlier in this brief, that in an action of tort whereby it is sought to recover damages for death, the right of action depends upon the *lex loci* of the injury.

Slater v. *Mexican Nat. R. Co.*, 194 U. S. 120, 126, 48 L. ed. 900, 902, 24 Sup. Ct. Rep. 581.

Atchison, T. & S. F. R. Co. v. *Sowers*, 213 U. S. 55, 67, 53 L. ed. 695, 700, 29 Sup. Ct. Rep. 397.

Stern v. *La Compagnie Générale Transatlantique*, 110 Fed. 997.

Erickson v. *Pacific Coast S.S. Co.*, 96 Fed. 80.

Boston & M. R. Co. v. *McDuffey*, 25 C. C. A. 247, 51 U. S. App. 111, 79 Fed. 934.

Theroux v. *Northern P. R. Co.*, 12 C. C. A. 52, 27 U. S. App. 508, 64 Fed. 84.

Davidow v. *Pennsylvania R. Co.*, 85 Fed. 943.

Boston & Maine R. Co. v. *Hurd*, 56 L. R. A. 193, 47 C. C. A. 615, 108 Fed. 116; 8 Am. & Eng. Enc. Law, 886.

With respect to actions brought by employees for injuries received outside of the territorial limitations of the United States, Mr. Labatt writes as follows (Labatt, Master and Servant, 2d. ed. Vol. 5, p. 6170): "When an action is brought in

the Federal Court for an injury received outside the territorial limits of the United States, the juridical situation is not affected by the peculiar relations existing between the National Government and the individual states. *Under such circumstances, therefore, the right of action is determined with reference to the general principles of private international law.* (*Vide:* Meili International Law, *supra.*) On the ground that under the Civil Code of Quebec (Acts 1053–1054) a servant can recover for injuries caused by the negligence of its co-servant, it was lately held by a Federal Court sitting in the District of Vermont that an American company was liable for injuries so caused, if they were received in that part of its system which was operated on Canadian territory. (Citing *B. & M. R.R. Co.* v. *McDuffey*, 79 Fed. 934 (Circuit Court of Appeals, First Circuit).) In a Vermont case, it has been held that in an action for injuries received in Quebec, evidence of the law of that province is admissible, although by that law, contributory negligence is not a defense to the action, while in Vermont it is. (Citing *Morrisette* v. *C. P. R.R. Co.*, 76 Vt. 267.)

In this connection, the case of *B. & M. R.R.* v. *Hurd*, 108 Fed. 116 (Circuit Court of Appeals, First Circuit), and the valuable note on the subject in 56 L. R. A. 193 is of special interest.

(5) The geographical limits of the Federal Act are evident in the decision declaring the Act of 1906 to be unconstitutional.

See *Employers' Liability Cases*, 207 U. S. 463.

While the first Federal Employers' Liability Act of 1906 was declared invalid, in that it was broader than the constitutional power delegated by the states to the national government, so far as it related to intrastate commerce, it was held to be valid as to the District of Columbia and the territories of the United States, for the reason that Congress

has plenary powers in matters relating to such territories. Congress also has plenary powers in all matters relating to foreign commerce.

Gibbons v. *Ogden*, 9 Wheat. 1.
American R.R. Co. v. *Birch*, 224 U. S. 547.
American R.R. Co. v. *Dedricksen*, 227 U. S. 145, 148.

In the face of that law, the court held the act to be invalid except so far as it related to the territories. That decision seems to go a long way towards establishing the geographical limits of the operation of the Federal Act. Oviously Congress was dealing with two different localities, the one having to do with the territories, and the other with the several states. In other words, in using the term "commerce between any of the . . . states or territories and any foreign nation or nations . . .", Congress was dealing with the several states, and not with foreign nations, as the plaintiff would have you believe. I do not intend to say that the terms "interstate commerce" and "foreign commerce" are necessarily synonymous. Quite to the contrary, it is easy to conceive of an instance of foreign commerce which did not involve an interstate movement. For instance, a train leaving New York City for Montreal at no time passes through any state in the Union other than New York, and yet it is engaged in foreign commerce as soon as it commences its journey. This kind of a case is what Congress had in mind in using the language quoted above. If the Supreme Court thought that the Act applied to employers and employees while in Canada, it is likely that the learned justice in delivering the opinion of the court would have treated foreign commerce in the same manner in which he treated commerce in the territories, and would have declared the Act to be valid as to foreign commerce. It is, of course, too clear to require mention that the several states in the Union have no power in matters relating to

foreign countries. That part of the Act applying to foreign commerce was as capable of separation by a judicial interpretation as that referring to the territories. The phrase quoted above marks the distinction, for the purpose of governmental regulations, between commerce which is confined to a single state and does not affect other states or nations, and commerce which concerns one or more of the several states and a foreign nation.

Second Employers' Liability Cases, 223 U. S. 1.

Furthermore, the decision in the first Federal Act would seem to dispose of the contention that the liability created is a contractual right; otherwise an employee of a railroad company operated in a territory where he became employed would have been entitled to maintain an action under the Act for an injury sustained in one of the states, even though he was then engaged in intrastate commerce.

(6) The amendment of 1910 helps to establish the geographical limits of the Federal Act.

Another argument against the giving of extraterritorial effect to the Federal Act is found in the amendment of 1910 providing where the action could be brought. This amendment provided that any action under the Federal Act could be brought in a Circuit Court of the United States in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action, and further provided that the jurisdiction of the courts of the United States should be concurrent with that of the courts of the several states, and any case arising under the Act and brought in any state court should not be removable to any court of the United States. Apparently Congress had in mind in passing the amendment that in the place where the cause of action might arise under the

Federal Act, *i.e.*, the *lex loci*, there would be a Circuit Court of the United States. Naturally the United States does not maintain Circuit Courts except in the several states and territories. It would seem to follow that Congress did not contemplate that the Act would give a remedy for death, except within the several states and territories, and certainly not in a foreign country. A strict construction of this amendment will permit of no other conclusion.

(7) The Federal Act cannot be the exclusive remedy in Canada in actions of this kind.

As I have already pointed out, the Supreme Court has held that the Federal Act is the exclusive remedy whereever it exists, provided the parties are engaged in work in furtherance of interstate or foreign commerce.

> *Pryor* v. *Williams*, 254 U. S. 43, 46, and cases cited before.

And the decisions of the national court control in construing the Federal Act.

> *Southern R. Co.* v. *Gray*, 241 U. S. 333.
> *Seaboard Air Line* v. *Horton*, 233 U. S. 492.

To put it in another way, wherever the Federal Act prevails, all other statutory or common laws are inoperative as to employees engaged in interstate or foreign commerce. If the Federal Act is held to be operative in Canada and other foreign nations, the natural consequence would be that the Federal Act has repealed all the statutes in Canada and other adjacent foreign nations, giving a right of action to an employee injured, or to the legal representative of an employee killed, while engaged in work of that kind in those countries so long as that employee and his employer were both citizens of the United States. Otherwise it would not be the exclusive remedy intended. Such a con-

clusion is the unavoidable result of the plaintiff's contention, and merely emphasizes its absurdity.

Assume, for the purpose of argument, that the Federal Act gives a remedy to the personal representative of an American citizen, who is killed while in the employ of a common carrier and while at work in foreign commerce, no matter where the negligent act occurs. At least so far as they are citizens of the United States, employees of railroads running into Canada would have a good cause of action under the Act. The rule must, of course, work both ways. It would naturally follow that Canadians, who come into the United States with the cars of a Canadian carrier, would be entitled to maintain actions under the laws of Canada for injuries received while in the United States. It has already been held that a Canadian railroad is liable under this Act for injuries received by an employee, while operating one of its trains in this country. (*Campbell* v. *Canadian Northern Ry. Co.*, 124 Minn. 245.) Of course there can be no doubt but an employee of a carrier can maintain an action under the laws of the place of the accident. Can it be said that an American citizen injured in Canada and a citizen of Canada injured in the United States would each have two separate and distinct causes of action and could select the one preferred? Such a conclusion is repugnant to the decided purpose of the Act to give an exclusive remedy, and is, I submit, untenable.

There is another situation which will show a very clear flaw in the plaintiff's contention. Assume that the crew on this particular train were all scheduled to go through from New York City to Montreal. There can be no doubt but the carrier and its employees were engaged in foreign commerce as soon as the train started from the Grand Central Station. (*Coe* v. *Errol*, 116 U. S. 517, and cases cited above.) At some point *en route*, but after the train had crossed the line into Canada, another man is added to the crew. This new member of the crew is a Canadian. He is a fellow-servant of the men who came from New

York. According to the contention of the plaintiff, if the Act did have extraterritorial effect, it would only apply to those employed while in the United States. Can it be that in case of an accident each member of the train crew, except this one man, has the choice of bringing an action under the law of Canada or the statutes of the United States? Such a result, I believe, would be extremely unjust and grossly repugnant to the rule that the law should be common to all similarly situated. There is no reason why one man who is acting as a brakeman on a foreign train should have greater rights than his fellow-servant on that train, merely because his fellow-servant did not start to work until after the train had arrived in Canada. Can it be that the measure of liability of a common carrier is to be governed by the citizenship or place of employment of its employees, rather than by the law of the place of the accident, which would be common to all? Such a result would cause hopeless confusion in the administration of the law.

Gould's Case, 215 Mass. 480, 486, 488.

A railroad company and its employees by going into another state or country and having and operating a road there, subjects itself and them to the legislation of that state or country.

Stone v. *Illinois Cent. R.R.*, 116 U. S. 347.
Brown v. *Duchesne*, 19 Howard, 183.
Roche v. *Washington*, 19 Ind. 53, 59.

Transitory actions have their foundation in the supposed violation of rights which, in the contemplation of law, have no locality and for which the right to compensation is recognized *by the laws of international comity that every nation may rightfully exercise jurisdiction over all persons within its limits*, in respect to matters purely personal.

Story, Conflict of Laws, s. 542.
Herrick v. *Minn. & St. Louis R.R. Co.*, 31 Minn. 11; 127 U. S. 210.

The sovereignty of a state commonly extends to all subjects of government within the territorial limits occupied by the associated people who compose it and, except upon the high seas, which belong equally to all men, like the air, and no part of which can rightfully be appropriated by any nation, the dividing line between sovereignties is usually a territorial line.

Ableman v. *Booth*, 21 Howard, 506, 516.
License Cases, 5 Howard, 504, 588.

I submit that the Federal Act as drafted and as construed by the courts of this country is impossible of operation in Canada or other foreign countries. There are many other practical difficulties to be encountered, if such a result is to be reached, which are obvious from a careful analysis of the Act and of the decisions upon it. I have only endeavored to point out a few of the most obvious difficulties.

(8) Rulings upon similar statutes show the attitude of judicial bodies to be in support of the contentions here made.

The Act to Regulate Interstate Commerce is similar to the Federal Employers' Liability Act in its reference to commerce with foreign nations.

The Interstate Commerce Commission exercises, among others, a kind of judicial authority or power.

Fuller on Interstate Commerce, page 56.

When a combination rate is in force from the United States to a point in Canada, the Interstate Commerce Commission has held that it has no jurisdiction of that part of the combination rate "applicable only in Canadian territory."

Fullerton Lumber & Shingle Co. v. *Bellingham Bay & British Columbia R.R. Co.*, 25 I. C. C. 376.

And foreign carriers participating in traffic from points in the United States to adjacent countries or *vice versa* are subject to the jurisdiction of the Commission.

In re Investigation Acts Grand Trunk Ry. of Canada, 3 I. C. C. 89.
In re Disturbance of Pass. Rates by Canadian Pacific R.R., 8 I. C. R. 71.
In re Investigation of Rates of Grand Trunk Ry. Co. of Canada, 2 I. C. R. 496.

The Commission's territorial jurisdiction carries up to the international boundary line, *at which that of Congress itself halts*, and as to foreign commerce is thus coextensive with that of the Federal Government. *No act of Congress has force of law beyond that boundary line*, but up to it, as everywhere else within the United States, the Interstate Commerce Act has full effect just as the Federal Control Act had effect when these shipments moved.

International Nickel Co. v. *Dir. Gen., as Agent*, 66 I. C. C. 627, 629.
Cist v. *Michigan Central R.R. Co.*, 10 I. C. C. 217.

The Supreme Court has decided that the jurisdiction of the Interstate Commerce Commission (which was established to supervise and direct interstate and foreign commerce) under the scope of the Act is limited naturally to only that part of the export or import rate and shipment belonging to and conducted by the carrier *in the United States.*

Texas and Pacific Ry. Co. v. *Interstate Commerce Commission*, 162 U. S. 197.

It is difficult to see why there should be any such limitation upon the jurisdiction of the Commission, if Congress has the power, as must be contended by the plaintiff, to

give extraterritorial effect to statutes regulating interstate and foreign commerce. The theory adopted by the trial court apparently was that Congress had the power to establish the rights and obligations of citizens of the United States and that once established by an act of Congress that act would follow those citizens to whom it applied even into adjacent foreign nations. The regulation of interstate and foreign commerce by the Commission involves, among others, the establishing of hours of labor for the employees, as well as certain other rules and regulations for their protection. I fail to see why rules and regulations of that nature should not follow the employee and protect him in foreign countries, if Congress can establish a remedy for violation of those rules and regulations and for other acts of negligence, effective in such countries. Acts which are evolved for his protection are as fully, if not more, important to the employee as those giving him a right of action for injuries received by reason of the violation of those acts. There is an old adage which seems very appropriate, "An ounce of prevention is better than a pound of cure." I submit there is far more reason for giving an extraterritorial effect to acts protecting the employee than for those giving him a remedy if injured.

As finally evolved, paragraph three of section 8 of Article 1 of the Constitution grants to Congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." In brief, the design of the framers of the Constitution in these few words was to provide uniformity in intercourse with foreign nations and between the several states, to prevent discriminatory commercial legislation and regulations by the different states, to stop unjust distinctions born of local jealousies and animosities, to make it impossible for certain states to build up a commercial supremacy at the expense of the prosperity of other states, to forestall the commercial conflicts which would arise if one state might prevent the importation of the property of another state into its territory,

and to insure so far as possible economic and commercial equality throughout the Union.

Fuller on Interstate Commerce, page 7.

(9) The decisions upon the various Workmen's Compensation Acts and Maritime Acts are not in point.

A. Workmen's Compensation Acts.

I have already shown earlier in this brief that in some states the Workmen's Compensation Acts have been given extraterritorial force. Those decisions have all been upon the theory that the Compensation Act is elective and a hiring thereunder is in effect a contract of employment into which the Act is read.

Pierce v. *Bekins Van & Storage Co.*, 172 N. W. 191 (Iowa).

Holmes v. *Communipaw Steel Co.*, 174 N. Y. S. 772.

Anderson v. *Miller Scrap Iron Co.*, 170 N. W. 275 (Wis.).

Friedman Mfg. Co. v. *Industrial Com.*, 120 N. E. 460 (Ill.).

State v. *District Court*, 139 Minn. 205.

The Compensation Act is a sort of insurance against accident.

Derinza's Case, 229 Mass. 435, 441.

Gould's Case, 215 Mass. 480, 482.

The liability (under the Workmen's Compensation Act) is based, not upon any act or omission of the employer, but upon the existence of the relation which the employee bears to the employment because of and in the course of which he has been injured.

Cudahy Packing Co. v. *Parramore*, 263 U. S. 418.

In *Washington* v. *Dawson & Co.*, 264 U. S., at p. 234, Mr. Justice Brandeis in his dissenting opinion said:

> "Workmen's Compensation laws which provide for compensation for injuries occuring in states other than that of the residence of the employer and the employee are held constitutional."

It is elementary that legal rights and obligations are created, not by acts of the parties or the happening of events, as such, but only by force of law.

See Beale, *Summary of the Conflict of Laws*, sec. 2.

Furthermore, it is fundamental in Anglo-American jurisprudence that the power of a soverign is territorially exclusive. There is, however, nothing inconsistent with this principle in the reasoning adopted by courts holding that the legislatures of the various states may give to Workmen's Compensation Acts an extraterritorial effect. In general, our law is territorial and not personal, but, writes Mr. Angel in an article entitled, "Recovery Under Workmen's Compensation Acts for Injury Abroad," (31 Harv. Law Review 619) referred to by Mr. Justice Brandeis in a recent opinion:—

> "This does not mean that rights and duties can be enforced only in the territory of the jurisdiction which created them; it does mean that such law does not ordinarily purport to create rights and impose duties by reason of acts, to which legal consequences may be annexed, occurring beyond the geographical confines of its territory. From this arises the presumption that, in the absence of clear indications to the contrary, a statute has no extraterritorial effect.
>
> In the absence of a compensation act in the state of the injury, may there be a recovery of compensation under the act of the home state? If the statute be construed not to provide compensation for injuries, etc., abroad, there can then clearly be no recovery.
>
> Before the question under an act of opposite intent and construction can be answered, one must inquire somewhat into the nature of the basis of workmen's

compensation. Text-writers and courts have demonstrated that the right to claim and the duty to pay compensation do not arise out of tort. It is sufficient to point out that liability in tort for personal injury depends in the main upon the element of negligence or wilful fault attributable in law to the defendant. On the other hand, compensation rights and duties are based solely on the fact of injury or death suffered under the stated conditions of the employment; these are wholly divorced from the element of negligence or wilful fault on the part of the employer."

Where an employee makes a contract of employment in one state and receives injuries in another, three situations in regard to the optional Workmen's Compensation Acts may exist. (*a*) There may be an Act in the state of the contract and none in the state of the injury; (*b*) there may be an Act in the state of the injury and none in the state of the contract; or (*c*) there may be Acts in both states.

(*a*) Where the only Act is that of the state of the contract, the great majority of decisions have allowed recovery under that Act for the injury abroad, *on the ground that the contract between the employer and the employee embodies as part of itself the Act of the state of the contract.*

Industrial Comm. v. *Aetna Life Ins. Co.*, 64 Colo. 480.
Kennerson v. *Thames Towboat Co.*, 89 Conn. 367.
Pierce v. *Storage Co.*, 185 Ia. 1346.
Hulswit v. *Escanaba Mfg. Co.*, 218 Mich. 331.
State ex rel. Chambers v. *District Court*, 139 Minn. 205.
Rounsaville v. *Central R.R. Co.*, 87 N. J. L. 371.
Pickering v. *Industrial Comm.*, 59 Utah 35.
Gooding v. *Ott*, 77 W. Va. 487.

There are decisions to the contrary (*Bridge Co.* v. *Industrial Comm.*, 287 Ill. 396; *Gould's Case*, 215 Mass. 480),

where the refusal to allow such a recovery is put upon the ground that the statute was intended to have no extra-territorial effect. So it is held that an action for negligent injury can not be maintained in the state of the contract (*Anderson* v. *Iron Co.*, 169 Wis. 106), or in the state of the injury (*Barnhardt* v. *Concrete Steel Co.*, 227 N. Y. 531); (*Schweitzer* v. *Gesellschaft*, 149 App. Div. 900); for the contract of hire under this doctrine contains the provision, common to all elective statutes, that the election to come under the Act bars the right of recovery at common law.

(*b*) If there is an Act in the state of the injury and none in the state of the contract, recovery is allowed under that Act, again on the theory of contract, it being said that the statute becomes a term of the contract as soon as the employee enters the state.

Douthwright v. *Champlin*, 91 Conn. 524.
American Radiator Co. v. *Rogge*, 86 N. J. L. 436.
Smith v. *Heine Safety Boiler Co.*, 119 Me. 552.

Here also it is held that no action at common law will lie for negligent injury.

Johnson v. *Nelson*, 128 Minn. 158.

(*c*) If an Act is in force in each state, a recent case has held that the contract of employment embodies only the Act of the state of the contract, and that an award under the Act of the state of the injury could not be sustained.

Hopkins v. *Matchless Metal Polish Co.*, 121 Atl. 828 (Conn., 1923).

In *Minto* v. *Hitchings & Co.*, 204 App. Div. 661, in which the court held that the law of New Jersey governed the injury occurring in New York, since both employer and employee were residents of New Jersey.

There is little law as to the extraterritorial effect of com-

pulsory Acts. It has been held, however, that where there is an Act in the state of the contract and none in the state of the injury, recovery will be allowed, a "constructive contract" being the device by which the foreign Act is given effect. *Post* v. *Burger*, 216 N. Y. 544. The contrary view was adopted in *Salmon Co.* v. *Pillsbury*, 174 Cal. 1, 162 Pac. 93 (1916), on the ground that the statute was intended to have no extraterritorial effect. See 1915 Cal. Stat., c. 607, s. 26, for a subsequent amendment giving extraterritorial effect to the Act in some cases. See *Altman* v. *Compensation Bureau*, 195 N. W. 287, 290, 291 (Mich., 1923).

As pointed out by Judge Brandeis in *Washington* v. *Dawson & Co.*, *supra*, p. 233,—

> "Tort is, in fact, not an element in the liability created by the workmen's compensation law. On the contrary, the basis of this legislation is liability without fault. Nor does the workmen's compensation law create a status between employer and employee. It provides an incident to the employment which is often likened to a contractual obligation, even where the workmen's compensation law is not of the class called optional."

In *Quong Ham Wah Co.* v. *Industrial Acc. Com.*, 184 Cal. 26 (case cited by Mr. Justice Brandeis in *Washington* v. *Dawson & Co.*, *supra*), Mr. Justice Lennon at page 35 said:

> "*We may assume, in accordance with the contention of respondents, that, if the imposition of the obligation to compensate a servant, not domiciled within the state, for injuries sustained without the geographical limits of the state were an attempt to create an obligation merely as an incident to a status, such legislation would conflict with well-defined legal principles. Whether such a law would amount to a mere regulation of status or to an expression of a positive duty the breach of which would be tantamount to a tort, it may be conceded that a law of that nature would not lie within the law-making province of a state which was neither the domicile of the servant nor the locus delicti.* The effect and purpose

> of the act now under consideration, however, cannot be held to be the regulation of a status or imposition *of a tort liability*. . . ."

There have been some few indications of secession from the contractual idea (see *Minto* v. *Hitchings & Co.*, 198 N. Y. Supp. 610 (1923); *Anderson* v. *Iron Co.*, 169 Wis. 106), especially in a situation where a contract is made in one state for work to be done predominantly in another. (Vide *Banks* v. *Howlett*, 92 Conn. 368 (1918); *Altman* v. *Compensation Bureau*, 196 N. W. 287 (Mich. 1923). But the American Courts are generally committed to the contract theory.) But I do not find that this Court has specifically passed upon the precise question in the case of compulsory workmen's compensation Acts. In *Quong Ham Wah Co.* v. *Indus. Acc. Com.*, 184 Cal. 26; 255 U. S. 445, referred to by Mr. Justice Brandeis in his dissenting opinion, this Court said, "But it is elementary that this Court is without authority to review and revise the construction affixed to a state statute as to a state matter by the court of last resort of the state." But if it be assumed that the weight of judicial precedent in this country is that compulsory acts of this nature so far as they affect extraterritorial injuries are within the *power* of Congress and of state legislatures, that proposition falls far short of sustaining the plaintiff's case. (But see Valuable notes upon the subject in 28 A. L. R. Ann. 1337 (1923); 18 A. L. R. Ann. 292; 3 A. L. R. Ann. 1351.) There still remains the fundamental question whether ever a compulsory act gives a remedy based on negligence or wrongdoing.

In matter of *Post* v. *Burger & Gohlke*, 216 N. Y. 544, the Court said at page 548:

> "If the claimant is only entitled to recover compensation for his injuries as for a tort, the general rule that an act of the legislature, unless otherwise shown, is not intended to apply outside of the boundaries of the state is applicable, and the award to him by the commission was erroneous. (*Whitford* v.

Panama R.R. Co., 23 *N. Y.* 465; *Goodwin* v. *Young*, 34 Hun. 252; *McDonald* v. *Mallory*, 77 N. Y. 546; Story's Conflict of Laws, ss. 18–20; *Johnson* v. *Phoenix Bridge Co.*, 197 N. Y. 316; *Liverpool & Great Western Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 448; *Gould's Case*, 215 Mass. 480.)

. . . . . .

In determining the intention of the legislature in enacting the Workmen's Compensation Law of this state there are two important provisions of the act that must constantly be borne in mind as they affect and characterize all the other provisions of the act. (1) In the absence of substantial evidence to the contrary it must be presumed that the claim comes within the provisions of the act. [Workmen's Compensation Law (Cons. Laws, ch. 67), s. 21.] (2) The liability of the employer for compensation includes every accidental personal injury sustained by the employee '*arising out of and in the course of his employment, without regard to fault as a cause of such injury.*' (Section 10.)

The act does not purport to provide compensation for a wrong. The compensation is given without reservation and wholly regardless of any question of wrongdoing of any kind."

In *Rounsaville* v. *Central R.R. Co.*, 94 Atl. Rep. 392, a erson was employed in New Jersey as a brakeman. He as injured in Pennsylvania. There was no question that e was engaged in interstate commerce. Held, that the laim of the employee should be sustained; and that while he Federal Employers' Liability Act is applicable only to ability in tort for negligence, while the Workmen's Comensation Act in New Jersey "is contractual, and, while ne contract liability is implied from silence, either party at liberty to adopt or reject the statutory contract. 'he liability of the employer depends not on any fault of is own or his servants, but on whether, by act or by silence, e has adopted the statutory terms. The amount of his ecuniary liability is fixed by statute and not by the verdict f a jury."

Referring to the question of the extraterritorial effect of the act, the court said: "We are now dealing with the simpler question, whether a New Jersey court will enforce a New Jersey contract, according to the terms of a New Jersey statute. The question hardly calls for an answer. The place where the accident occurs is of no more relevance than is the place of accident to the assured, in an action on a contract of accident insurance, or the place of death of the assured, in an action on a contract of life insurance."

The only conceivable theory upon which plaintiff can prevail in this Court is by advancing the argument that the Federal Employers' Liability Act is read into every contract of service entered into between American railroads operating in foreign countries and their employees. But there is a manifest difference between compulsory and optional workmen's compensation acts, whether they be compulsory or optional, and the Federal Employer's Liability Act, because in the former the correlative rights and obligations are in their nature essentially contractual. They do not correspond with the legal conception of a tort because liability there is imposed without regard to the element of wrongdoing upon the part of the person charged. The obligation is to be defined as a statutory one attached by law to a given status or adopted into the employment contract.

The precise question was carefully considered and the principle was well stated by the Supreme Court of Alabama in *Ala. G. S. R. Co.* v. *Carroll*, 97 Ala. 126; 18 L. R. A. 433, 38 Am. State Report 163. That case turned upon the applicability of the Employer's Liability Act of Alabama abrogating certain common law defences to an action in Alabama for injuries sustained in Mississippi. *The contention that the Alabama law governed because it was a part of the contract of employment (which had been made in Alabama) was met and answered by the Court upon convincing grounds.* While all the material parts of this opinion are too long to quote in this brief, its thorough and convincing

liscussion of the whole question is particularly called to he attention of the Court. In the course of its opinion, he Court said:

"Another consideration,—that referred to above,—it is insisted, entitles this plaintiff to recover here under the Employers' Liability Act for an injury inflcted beyond the territorial operation of that Act. This is claimed upon the fact that at the time plaintiff was injured he was in the discharge of duties which rested on him by the terms of a contract between him and the defendant, which had been entered into in Alabama, and hence was an Alabama contract, in connection with the fact that plaintiff was and is a citizen of this state, and the defendant is an Alabama corporation. *These latter facts—of citizenship and domicil, respectively, of plaintiff and defendant—are of no importance in this connection, it seems to us, further than this: they may tend to show that the contract was made here, which is not controverted, and, if the plaintiff has a cause of action at all, he, by reason of them, may prosecute it in our courts. They have no bearing on the primary question of the existence of a cause of action.* and, as that is the question before us, we need not further advert to the fact of plaintiff's citizenship or defendant's domicil.

The contract was that plaintiff should serve the defendant in the capacity of a brakeman on its freight trains between Birmingham, Ala., and Meridian, Miss., and should receive as compensation a stipulated sum for each trip from Birmingham to Meridian and return. The theory is that the Employers' Liability Act became a part of this contract, that the duties and liabilities which it prescribes became contractual duties and liabilities, or duties and liabilities springing out of the contract, and that these duties attended upon the execution whenever its performance was required, in Mississippi as well as in Alabama, and that the liability prescribed for a failure to perform any of such duties attached upon such failure and consequent injury wherever it occurred, and was enforceable here, because imposed by an Alabama contract, notwithstanding the remission of duty and the resulting injury occurred in

Mississippi, under whose laws no liability was incurred by such remission. The argument is that a contract for service is a condition precedent to the application of the statute, and that, 'as soon as the contract is made, the rights and obligations of the parties under the Employers' Act "became vested and fixed," so that "no subsequent repeal of the law could deprive the injured party of his rights, nor discharge the master from his liabilities," etc.' If this argument is sound, and it is sound if the duties and liabilities prescribed by the Act can be said to be contractual duties and obligations at all, it would lead to conclusions, the possibility of which has not hitherto been suggested by any court or law writer; and which to say the least, would be astounding to the profession. For instance, if the Act of 1885 becomes a part of every contract of service entered into since its passage, just 'as if such law were in so many words expressly included in the contract as a part thereof,' as counsel insist it did, so as to make the liability of the master to pay damages for injuries to a fellow servant of his negligent employe a contractual obligation, no reason can be conceived why the law existing in this regard prior to the passage of that Act did not become in like manner a part of every contract of service then entered into, so that every such contract would be deemed to contain stipulations for the non-liability of the master for injuries following from the negligence of a fellow servant, and confining the injured servant's right to damages to a claim against his negligent fellow servant; the former, in other words, agreeing to look alone to the latter. There were many thousands of such contracts existing in this country and England at the time when statutes similar to section 2590 of our Code were enacted. There were, indeed, many thousands of such contracts existing in Alabama when that section became the law of this state. Each of these contracts, if the position of plaintiff as to our statute being embodied into the terms of his contract, so that its duties were contractual duties and its liabilities contractual obligations to pay money, can be maintained, involved the assurances of organic provisions, state and Federal, of the continued non-

liability of the master for the negligence of his servants, notwithstanding the passage of such statutes. Yet these statutes were passed, and they have been applied to servants under pre-existing contracts as fully as to servants under subsequent contracts, and there has never been a suggestion even, in any part of the common-law world, that they were not rightly so applied. If plaintiff's contention is well taken, many a judgment has gone on the rolls in this state and throughout the country, and been satisfied, which palpably overrode vested rights, without the least suspicion on the part of court or counsel that one of the most familiar ordinances of the fundamental law was being violated. Nay, more; another result, not heretofore at all contemplated, would ensue. Contracts for service partly in Alabama might be now entered into in adjoining states, where the common-law rule still obtains, as in Mississippi, for instance, where the servant has no right to recover for the negligence of his fellow; and the assumption of this risk, under the law becoming, according to the argument of counsel, a contractual obligation to bear it, such contracts would be good in Alabama; and, as to servants entering into them, our statute would have no operation, even upon negligence and resulting injury, within its terms, occurring wholly in Alabama. And, on the other hand, if this defendant is under a contractual obligation to pay the plaintiff the damages sustained by him because of the injury inflicted in Mississippi, the contract could be of course enforced in Mississippi, and damages there awarded by its courts, notwithstanding the law of that state provides that there can be no recovery, under any circumstances whatever, by one servant for the negligence of his fellow employe. We do not suppose that such a proposition ever has been or ever will be made in the courts of Mississippi. Yet that it should be made and sustained is the natural and necessary sequence of the position advanced in this case. . . ."

Whether a state legislature may pass a workmen's compensation act that has an extraterritorial effect in a *foreign country* has not been decided so far as I know. But for

the purposes of this case, it is immaterial whether it be assumed that such legislation would not contravene principles of international law to which I have called attention.

B. Maritime Acts.

It may be argued by counsel for the plaintiff that the situation here is similar to that arising in cases under the Maritime Acts, where the courts have uniformly held that the Acts of Congress apply to injuries received by American sailors on American ships while in foreign waters. To compare the kitchen of a buffet-car, while in a foreign country, with the decks of a ship, while on the high seas, seems absurd and without judicial support. Special provision in the Constitution deal with maritime torts. Art. III, s. 2, extends the judicial power of the United States "to all cases of admiralty and maritime jurisdiction," and Art. 1, s. 8, confers upon Congress power to make all laws which may be necessary and proper for executing the powers vested in the general government or in any of its departments or officers. Under the decisions the deck of an American vessel, while on the high seas, has been recognized as American territory. These decisions rest not on the commerce clause, but on the admiralty jurisdiction, in the Constitution.

Southern Pacific Co. v. *Jensen*, 244 U. S. 205, 213, 214.
Craig v. *Insurance Co.*, 141 U. S. 638.
Butler v. *Boston S.S. Co.*, 130 U. S. 548.
Baltimore & Ohio R.R. v. *Maryland*, 21 Wall. 456.
In re Garrett, 141 U. S. 1.
The Daniel Ball, 10 Wall. 557.
The Roanoke, 189 U. S. 185.
The Lottawanna, 21 Wall. 558.

It may be conceded that Congress may pass a bill providing for the recovery of damages on the high seas under

s power to regulate commerce with foreign nations and mong the several states and in pursuance of the constitu- ional provisions extending the judicial power of the Govern- ient to "all cases of admiralty and maritime jurisdiction." Vide, 22 H. L. Rev. p. 410; Sec. 125½ U. S. Compiled tatutes (Mar. 30, 1920, c. 111, s. 1), "An Act relating to he maintenance of actions for death on the high seas and ther navigable waters."]

In *Cunard S.S. Co.* v. *Mellon*, 262 U. S. 100 Mr. Justice an Devanter referred to the statement sometimes made iat a merchant ship is a part of the territory of the country hose flag she flies. "But this, as has been amply observed, a figure of speech, a metaphor . . . the jurisdiction hich it is intended to describe arises out of the nationality f the ship as established by her domicile registry and use f the flag, and partakes more of the characteristics of ersonal than of territorial sovereignty . . . it is chiefly pplicable to ships on the high seas *where there is no terri- rial sovereign;* and as respects ships in foreign territorial aters it has little application beyond what is *affirmatively tacitly permitted by the local sovereign.* 2 Moore Inter- ational Law Digest, sections 204, 205." Admiralty rules enerally rest in the acquiescence of maritime nations in ertain principles of practical importance to all.

Under the so-called Jones Act (Merchant Marine Act, 920), June 5th, 1920, it is provided:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of

> action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

Prior to the decision of *Cunard S.S. Co.* v. *Mellon, supra*, District Judge Cushman in *Wenzler* v. *Robbin Line S.S. Co.*, (277 Fed. 812), held that an action by a seaman of a vessel of the United States for injuries received in a foreign port, while in performance of his duties on board, through alleged negligence in the management of the ship, is governed by the law of the United States, and not that of the port, and, therefore, that certain provisions of the Federal Employers' Liability Act were applicable.

It is possible that when this precise question is presented to this Court it will strictly follow the rule in *Cunard S.S. Co.* v. *Mellon*, for it must be borne in mind that in the Cunard case, Mr. Justice Van Devanter said:

> "The merchant ship of one country voluntarily entering the territorial limits of another subjects herself to the jurisdiction of the latter. The jurisdiction attaches in virtue of her presence, just as with other objects within those limits. During her stay she is entitled to the protection of the laws of that place and correlatively is bound to yield obedience to them. Of course, the local sovereign may out of considerations of public policy choose to forego the exertion of its jurisdiction or to exert the same in only a limited way, but this is a matter resting solely in its discretion."

A judge of the Supreme Court of New York in the case of *Bennett* v. *Runelly* (New York Law Journal, Dec. 29, 1923) held that the Jones Act did not apply to a case involving death by wrongful act while vessel was making dock at Montreal.

But the determination of that question has no controlling importance whatever upon the one certified for the simple

ason that the accident occurred in a foreign country here the railroad was bound to yield obedience to the reign laws of such country. In short, the accident happened where there was a territorial sovereign. The Federal mployer's Liability Act under the provision of the Jones ct so-called may have application to an action brought y a seaman of a domestic ship injured in a foreign port, though there would seem to be much doubt of that propotion, in view of Judge Van Devanter's language, but that entirely apart from the question presented. Congress as not as yet declared that in actions by railroad employees r death or injuries in foreign countries, Federal laws are vailable. It is submitted that Congress cannot properly ass such a law, for reasons hereinbefore expressed. There re well defined limitations upon the right of Congress to de roughshod over principles of international law. But here is certainly nothing at the present time in the Federal iability Act which warrants the assumption that American ilroads doing business in a foreign country are not bound yield obedience to the laws of that country.

I submit that there is an obvious difference between the ases arising under the Federal Employers' Liability Act nd those under Workmen's Compensation and the Marime Acts.

(10) Authorities relied upon by the plaintiff in the ircuit Court are not in point.

In the court below the plaintiff relied upon the cases of:

United States v. *Bowman*, 260 U. S. 94.
Wilson v. *McNamee*, 102 U. S. 572.
The E. B. Ward, 17 Fed. 456.
Crapo v. *Kelley*, 16 Wall. 610.
Wilddenhaus's Case, 120 U. S. 12.
McDonald v. *Mallory*, 77 N. Y. 546.

An examination of these cases will readily show that they all have to do with the alleged misconduct or negligence of the defendant on board a vessel while upon the high seas, and, as I have already pointed out, a country will treat some relations between its own citizens as governed by its own laws in regions subject to no sovereign, *like the high seas:*

See *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347.

United States v. *Nord Deutscher Lloyd*, 223 U. S. 512.

Obviously there is no comparison between the liability of the owner of a ship to employees injured upon that ship by reason of the negligence of the owner while that ship is upon the high seas, and therefore subject to no sovereign, and the liability of a railroad company to its employees injured by reason of its negligence while it is conducting its business and such employees are working for it in a foreign country and therefore subject to the sovereignty of that foreign country.

Other cases cited by the plaintiff below are to the effect that where one is given a remedy by the law of the place where the accident occurred, he may enforce it in any place where he may obtain jurisdiction over the guilty party upon the theory of comity. Obviously there is no question as to the soundness of this doctrine, and I do not question but the plaintiff would have been within his rights in bringing his suit in the District Court of the United States for the District of Massachusetts, under the common law or the Civil Code of the Province of Quebec, and that had he so brought his action he would have been entitled to recover if under that law he showed a cause of action.

The suggestion in the brief of the plaintiff, that if he is not permitted to maintain this action under the Federal Employers' Liability Act he would be without remedy, is

without foundation, either in truth or in fact, had he prosecuted in the proper way at the proper time. Furthermore, the circumstance that the law of the country in which one is injured does not give one a remedy, is no good reason for extending the laws of this country into foreign countries.

II.

CONCLUSION.

To recapitulate, there is nothing in the commerce clause of the Constitution or in the provisions of the Federal Employers' Liability Act which warrants the assumption that Congress intended this highly remedial legislation to have any extraterritorial effect in a foreign country; that it is fundamental in an action of tort whereby it is sought to recover damages for death occasioned by negligence, that the right of action depends upon the *lex loci* of the injury; that when an action is brought in a Federal Court for an injury received outside the territorial limits of the United States, the juridical situation is not affected by the peculiar relations existing between the National Government and the individual states. Under such circumstances, therefore, the right of action is determined with reference to the general principles of private international law. It is impossible to couch our conclusion in more suitable language than that of Mr. Justice Holmes, in the case of *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, at pages 355 and 357, as follows: "All legislation is *prima facie* territorial. . . . It is obvious that, however stated, the plaintiff's case depends on several rather startling propositions. In the first place, the acts causing the damage were done so far as appears, outside the jurisdiction of the United States and within that of other states [or nations].

It is surprising to hear it argued that they were governed by the act of Congress."

Ex parte Blain, In re Sawers, 12 Ch. Dv. 522, 528.
State v. *Carter*, 27 N. J. L. 499.
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Respectfully submitted,

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